

## THE BOUNDARIES OF HUMAN RIGHTS JURISDICTION IN EUROPE

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Over the past half-century, complex systems of norms, institutions and procedures have regionalized many aspects of human rights law in Europe. The Contracting Parties to the European Convention on Human Rights,<sup>1</sup> for example, have repeatedly lengthened the list of guaranteed rights and expanded individual access to the European Court of Human Rights. The result, as J.G. Merrills has noted, is that “there is no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the Convention, [and consequently] there is no matter of domestic law and policy which may not eventually reach the European Court.”<sup>2</sup> Those issues that might escape jurisdiction of the ECHR may still be scrutinized if they fall within the jurisdiction of the European Union’s Court of Justice (ECJ) or the mandate of the bodies and procedures established in the framework of the Organization for Security and Cooperation in Europe (OSCE).

The strengthening and proliferation of European regional bodies monitoring the human rights performance of their Member States raise fundamental issues of governance. While the need for regional human rights protection is unquestioned in Europe, views diverge about the appropriate division of jurisdiction and authority between the Member States and regional bodies and among the different regional institutions. In particular, there is tension between the desire to have regional bodies establish and enforce uniform human rights standards and the need to respect Member States’ diversity. Where regional human rights norms do exist, a second and related problem concerns limitations on those rights, and achieving the appropriate balance between individual rights and the state general interest. Who

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 [hereinafter European Convention or ECHR].

2. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 9 (2d. ed. 1993).

decides, for example, between competing values such as privacy and national security, or home life and environmental protection? As the membership in European institutions has expanded eastward, concerns about maintaining a high standard of human rights protection have increased the desire for uniform regional norms.

This article addresses these questions and concerns. The first part presents an overview of the three regional systems of Europe concerned with human rights. Part II examines the role of the two regional courts, the ECHR and the ECJ, as supervisory bodies established to ensure compliance with regional obligations. It discusses the courts' methods of interpreting human rights obligations, including the notion of subsidiarity and the doctrine of margin of appreciation. Also considered are implied rights, evidence and fact-finding, the remedial powers of the courts, and the regional response to gross and systematic violations. Part III considers the problem of potential conflicts of jurisdiction among the various regional bodies. The conclusion evaluates the impact of the European human rights systems on the laws and practices of the Member States. It also considers the serious issues that must be addressed in the near future to ensure the continued functioning of the regional systems in the face of expanding membership and growing caselaw.

## I. EUROPEAN REGIONAL INSTITUTIONS

Jurisdiction over human rights matters within Europe is conferred on three entities of partially overlapping membership: the Council of Europe, the European Union (EU) and the OSCE. None of them is concerned exclusively with human rights, but each one considers the topic essential to achieving its objectives.

### A. The Council of Europe

A little over 50 years ago, 10 northern and western European countries<sup>3</sup> created the Council of Europe, the first post-war European regional organization. Europe had been the theater of the greatest atrocities of the Second World War and felt compelled to press for international human rights guarantees as part of its reconstruction. Faith in western European traditions of democracy, the rule of law

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3. The original Member States of the Council of Europe and drafters of the European Convention on Human Rights are Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom.

and individual rights inspired belief that a regional system could be successful in avoiding future conflict and in stemming post-war revolutionary impulses backed by the Soviet Union.<sup>4</sup> The Statute of the Council provides that each Member State must “[a]ccept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”<sup>5</sup>

A year later, these same states, self-described as “like-minded and hav[ing] a common heritage of political traditions, ideals, freedom and the rule of law,” agreed to take the “first steps for the collective enforcement of certain of the rights stated in the Universal Declaration (of Human Rights)”<sup>6</sup> and adopted the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter European Convention).<sup>7</sup> Today, membership in the Council is *de facto* conditioned upon adherence to the European Convention and cooperation with its supervisory machinery,<sup>8</sup> a condition met by all of the 44 Member States.<sup>9</sup> In addition, accession requires free and fair

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4. In the preamble to the European Convention on Human Rights, the contracting parties declare that they are “reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.” For a discussion of the Convention’s history, see J.G. Merrills, *The Council of Europe (I): The European Convention on Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 221–23 (Rhija Hanski & Markku Suksi eds., 1997) (“Many statesmen of the immediate post-war epoch had been in resistance movements or in prison during the Second World War and were acutely conscious of the need to prevent any recrudescence of dictatorship in Western Europe.”). Merrills also views the emergence of the East-West conflict as a stimulus to closer ties in Europe. *Id.* at 222.

5. Statute of the Council of Europe, May 5, 1949, art. 3, E.T.S. No. 1, Gr. Brit. T.S. No. 51 (Cmnd. 8969).

6. Pmbl, ECHR, *supra* note 1 (citing the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 51, U.N. Doc. A/37/51 (1948)).

7. *Id.* On the origins and legislative history of the Convention, see A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 1 (3rd ed. 1993); COUNCIL OF EUROPE, COLLECTED EDITION OF THE ‘TRAVAUX PRÉPARATOIRES’ OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (8 vols., 1975–85).

8. Vienna Declaration of the Heads of State and Government of the Council of Europe, Oct. 9, 1993, *reprinted in* D. HUBER, *A DECADE WHICH MADE HISTORY: THE COUNCIL OF EUROPE 1989–1999* 247 (1999). *See also* Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe, adopted by the Comm. of Ministers on Nov. 10, 1994, *reprinted in* Council of Europe, Information Sheet No. 35 (1995), app. I, 146.

9. Member States as of April 2002 are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the “for-

elections based upon national suffrage, freedom of expression, protection of national minorities and observance of the principles of international law.<sup>10</sup> Several new Member States also have entered into additional and specific commitments during the examination of their request for membership.<sup>11</sup>

The drafters of the European Convention focused their attention primarily on developing control machinery to supervise implementation and to enforce the initially short list of guaranteed rights. This focus adhered to the mandate of the Congress that helped create the Council of Europe: “We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; We desire a Court of Justice with adequate sanctions for the implementation of this Charter.”<sup>12</sup> A Resolution adopted by the Congress stated its conviction

that in the interest of human values and human liberty, the (envisaged) Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter, and to this end any citizen of the associated countries shall have redress before the Court, at any time and with the least possible delay, of any violation of his rights as formulated in the Charter.<sup>13</sup>

The European Convention drafters moved cautiously towards fulfilling the aspirations of the Congress. The original Convention set forth a short list of civil and political rights and a single and opening statement of the obligation of Contracting Parties: “The High Con-

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mer Yugoslav Republic of Macedonia,” Turkey, Ukraine, United Kingdom. Belarus and Yugoslavia are the only non-Member States in the region. See About the Council of Europe, at [http://www.coe.int/T/E/Communication\\_and\\_Research/contacts\\_with\\_the\\_public/About\\_Council\\_of\\_Europe?COE\\_Map\\_&\\_Members](http://www.coe.int/T/E/Communication_and_Research/contacts_with_the_public/About_Council_of_Europe?COE_Map_&_Members) (last visited Nov. 9, 2002); Chart of Signatures and Ratifications, at <http://conventions.coe.int/treaty/En/cadreprincipal.htm> (last visited Nov. 9, 2002).

10. Vienna Declaration of the Heads of State and Government of the Council of Europe, *supra* note 8.

11. For a complete list of specific commitments entered into by Member States, see *Compliance with commitments entered into by member states: Undertakings entered into upon accession to the Council of Europe*, COE doc. Monitor/Inf (99) 1, Feb. 18, 1999, and Addendum. For commentary, see J.F. Flauss, *Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe*, in 5 EUR. J. INT'L L. 401 (1994); Hans Winkler, *Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe*, 47 AUSTRIAN J. PUB. & INT'L L. 147 (1995).

12. *Message to Europeans*, adopted by the Congress of Europe, May 8–10, 1948, quoted in Council of Europe, Report of the Control System of the European Convention on Human Rights 4 (H(92)14) (Dec. 1992).

13. *Id.*

tracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”<sup>14</sup> The European Convention initially established two institutions whose mandate was “to ensure the observance of the engagements undertaken by the High Contracting Parties:”<sup>15</sup> the European Commission of Human Rights and the European Court of Human Rights. The former Commission and Court were replaced on November 1, 1998, with the entry into force of Protocol 11<sup>16</sup> and the inauguration of a new full-time Court. The European Convention also confers some supervisory functions relating to the enforcement of the rights it guarantees on the Committee of Ministers,<sup>17</sup> the governing body of the Council of Europe. Moreover, because the European Convention is a treaty adopted within the framework and under the auspices of the Council of Europe, some of its other organs and institutions also play important roles in facilitating the application and implementation of the European Convention.<sup>18</sup>

The Court today is composed “of a number of members equal to that of the High Contracting Parties” to the European Convention.<sup>19</sup> The judges are elected for a six-year renewable period by the Parliamentary Assembly<sup>20</sup> of the Council of Europe from a list of three nominees submitted by each Member State. The judges serve in their individual capacities and must be persons of “high moral character,”

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14. ECHR, *supra* note 1, art. 1.

15. *Id.* art. 19.

16. Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994 (Nov. 1, 1998), E.T.S. 155, *reprinted in* 33 I.L.M. 960 (1994).

17. *Id.* arts. 46(2) and 54.

18. See ECHR, *supra* note 1, arts. 15(3), 22(1), 30(1), 52 and 58. See, e.g., Caroline Ravaud, *The Committee of Ministers*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 645 (R. Macdonald et al. eds., 1993); N. Bratza and M. O’Boyle, *The Legacy of the Commission to the New Court Under the Protocol No. 11*, in *THE BIRTH OF EUROPEAN HUMAN RIGHTS LAW: ESSAYS IN HONOUR OF CARL AAGE NØRGAARD* 388 (Michele de Salvia & Mark E. Villiger eds., 1998); Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11—Entry into Force and First Year of Application*, in 21 *HUM. RTS. L.J.* 1 (2000).

19. ECHR, *supra* note 1, art. 20.

20. The Parliamentary Assembly is one of the Council of Europe’s two main statutory organs and represents the main political tendencies in its Member States. The Assembly sees its role as primary in extending European co-operation to all democratic states throughout Europe. The Parliamentary Assembly’s members and substitutes are elected or appointed by national parliaments of Council of Europe Member States from among their own parliamentarians. Each country has between 2 and 18 representatives depending on the size of its population. National delegations to the Assembly are supposed to ensure a fair representation of the political parties or groups in their parliaments.

who “possess the qualifications required for appointment to high judicial office or be persons of recognized competence.”<sup>21</sup> The judges do not have to be nationals of the Member States of the Council of Europe. They serve full-time during their term and may not undertake any activity incompatible with their judicial functions. They must retire at age 70. The permanent Court has its seat in Strasbourg, also the seat of the Council of Europe, and judges are expected to live in the area. The Court has a Registry and legal secretaries to assist it. The Registrar is the chief clerk of the Court.

Although the European Convention initially created an independent Commission and Court, the drafters made the Court’s jurisdiction optional. They also established, but again made optional, the world’s first individual petition procedure for human rights violations. The “normal” procedure thus envisaged was one of inter-state complaints brought through the Commission to the Committee of Ministers.<sup>22</sup> The Commission would meet in closed sessions, undertake fact-finding, attempt a friendly settlement of the matter, and report its findings to the Committee of Ministers for decision.<sup>23</sup> Only the Commission or the state could refer a matter to the Court, if the state in question had accepted the Court’s jurisdiction. Enforcement of judgments of the Court and decisions of the Committee of Ministers lay with the Committee itself, which could suspend a state from its rights of representation or ask it to withdraw from the Council for serious violations of its obligations.

During the intervening half century, this rather modest system has undergone evolutionary, sometimes revolutionary changes. The Council of Europe has adopted 13 protocols to the European Convention, and in the process expanded the list of guaranteed civil and political rights. The first Protocol added a right to property, a right to education and the undertaking by the Contracting Parties to hold free and secret elections at reasonable intervals.<sup>24</sup> Protocol No. 4 enlarged

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21. ECHR, *supra* note 1, art. 21(1).

22. The Commission acquired its competence to receive individual petitions in 1955, after six states accepted the right of petition. Many states took decades to accept the right of individual petition. The U.K. filed its first declaration on 14 January 1966; France and Greece did not accept the right of petition until 1981, while Turkey presented its acceptance only in 1987.

23. The original members of the Commission were mostly civil servants and members of parliament; only three of the initial 13 members had legal experience. The Court came into existence in 1959.

24. Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted March 20, 1951, (entered into force May 18, 1954), E.T.S. 9.

the list further by prohibiting deprivation of liberty for failure to comply with contractual obligations, by guaranteeing the right to liberty of movement, and by barring forced exile of nationals and the collective expulsion of aliens.<sup>25</sup> Protocol No. 6 abolished the death penalty except during wartime<sup>26</sup> and Protocol No. 7 requires states to accord aliens various due process safeguards before they may be expelled from a country where they reside.<sup>27</sup> The instrument also provides for rights of appeal in criminal proceedings, compensation in cases of miscarriage of justice, protection against double jeopardy, and equality of rights and responsibilities between spouses.<sup>28</sup> Protocol No. 12 augments the non-discrimination guarantee in Convention Art. 14 by providing that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground,” adding that “no one shall be discriminated against by any public authority.”<sup>29</sup> Protocol No. 13, adopted by the Committee of Ministers on February 21, 2002, abolishes the death penalty under all circumstances.<sup>30</sup>

Other protocols gradually enhanced the role and status of the individual before the Court and eliminated the discretion of Member States to accept the jurisdiction of the Court and the right of individual petition. In 1990, Protocol No. 9 enabled individuals to take cases to the Court in certain circumstances.<sup>31</sup> Protocol No. 11 fundamentally restructured the system, eliminating the Commission and providing the new full-time Court with compulsory jurisdiction over interstate and individual cases brought against Contracting Parties to the Convention.<sup>32</sup> Today the states are locked into a system of collective responsibility for the protection of human rights, a system in

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25. Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, (entered into force May 2, 1968), E.T.S. 46.

26. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, April 28, 1983, (entered into force March 1, 1985), E.T.S. 114, *reprinted in* 22 I.L.M. 539 (1983).

27. Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, (entered into force Nov. 1, 1988), E.T.S. 117, *reprinted in* 24 I.L.M. 435 (1985).

28. *Id.*

29. Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, (not yet in force), E.T.S. 177.

30. The Protocol opened for signature on May 3, 2002.

31. Protocol No. 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, (entered into force Oct. 1, 1994), E.T.S. 140, *reprinted in* 30 I.L.M. 693 (1991).

32. Protocol 11, *supra* note 16.

which the jurisdiction of the Court provides the centerpiece. Pursuant to Article 34 of the Convention, the Court now may receive applications from “any person, non-governmental organization or group of individuals claiming to be the victim of a violation . . . of the rights set forth in the Convention or the protocols thereto.”<sup>33</sup>

The role of the Court has been complicated, however, by the emergence of other Council of Europe instruments and institutions concerned with human rights. First, the European Social Charter (ESC)<sup>34</sup> with its protocols provides a system for the promotion and protection of economic, social and cultural rights.<sup>35</sup> The Charter was opened for signature on October 18, 1961 and entered into force on February 26, 1965. It was amended by Protocol in 1988<sup>36</sup> and again in 1991.<sup>37</sup> The 1991 Protocol modifying the supervisory mechanism of the Charter is not yet in force, as it requires ratification by all parties to the Charter. Most of its provisions, however, have been implemented through actions taken by the supervisory organs.

Two additional instruments have continued the evolution of the ESC. A further Protocol provides for a system of collective complaints.<sup>38</sup> Finally, in 1996, a Revised European Social Charter,<sup>39</sup> bringing the earlier documents up to date and adding some new rights, was opened for signature. It will progressively replace the original Charter and, as the consolidated text, is the basic instrument for the future.

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33. ECHR, *supra* note 1, art. 34.

34. European Social Charter, Oct. 18, 1961, (entered into force Feb. 26, 1965), E.T.S. 35, 529 U.N.T.S. 89.

35. See, e.g., DAVID HARRIS, *THE EUROPEAN SOCIAL CHARTER* (1984); Anne Theodore Briggs, *Waking ‘Sleeping Beauty’: The Revised European Social Charter*, 7 HUM. RTS. BRIEF 24 (2000); Klaus Fuchs, *The European Social Charter: Its Role in Present-Day Europe and Its Reform*, in KRZYSZTOF DRZEWICKI, CATARINA KRAUSE & ALLAN ROSAS, *SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE* 151 (1994). See also Roger J. Goebel, *Employee Rights in the European Community: A Panorama from the 1974 Social Action Program to the Social Charter of 1989*, 17 HASTINGS INT’L & COMP. L. REV. 1, 58 (1993).

36. The 1988 Protocol imposes legal obligations regarding additional economic and social rights. Additional Protocol to the European Social Charter, May 5, 1988, (entered into force Sept. 4, 1992), E.T.S. 128.

37. Protocol Amending the European Social Charter, adopted Oct. 21, 1991, (not yet in force), E.T.S. 142.

38. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, (entered into force July 1, 1998), E.T.S. 158.

39. European Social Charter (Revised), May 3, 1996, (entered into force July 1, 1999), E.T.S. 163 [hereinafter Revised Charter].



The Revised Charter proclaims in Part I categories of “rights and principles,” including workers’ rights and family and individual rights to social security, health, and medical assistance. Migrant workers, women, children, the elderly, and disabled persons are afforded special protections. Part II of the Revised Charter defines the meaning and elaborates on the general principles set out in Part I. Part III of the Revised Charter specifies the obligations of the States Parties, giving each state a set of options. First, each state undertakes “to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means.”<sup>40</sup> Second, the state must accept as binding at least six out of nine articles<sup>41</sup> found in Part II. Third, each State Party has an obligation to select another specified number of rights or sub-categories of rights with which it agrees to comply.<sup>42</sup> This flexible system was drafted to induce the maximum adherence of states while obliging all States Parties to guarantee some of the most basic rights.

The Charter establishes a reporting system and a system of collective complaints to monitor the compliance by states with their obligations.<sup>43</sup> The reporting procedure calls for two types of reports. The first is due every two years and must address the domestic implementation of those Part II rights that the particular state has accepted.<sup>44</sup> The second report, whose periodicity is determined by the Committee of Ministers, addresses the status of Part II rights that the particular State Party did not accept.

The initial review of state reports is by the European Committee of Social Rights (ECSR), a group of nine experts “of the highest integrity and recognized competence in international social questions,” elected by the Committee of Ministers.<sup>45</sup> They assess whether the

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40. Revised Charter, *id.* art. A(1)(a).

41. The nine provisions are Article 1 (right to work), Article 5 (right to organize), Article 6 (right to bargain collectively), Article 7 (the right of children and young persons to protection), Article 12 (right to social security), Article 13 (right to social and medical assistance), Article 16 (right of the family to social, legal and economic protection), Article 19 (right of migrant workers and their families to protection and assistance) and Article 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

42. See Revised Charter, *supra* note 39, art. A(1)(c).

43. *Id.* Part IV, arts. 22–24.

44. *Id.* art. 21.

45. European Social Charter, *supra* note 34, art. 25. The Charter refers to a seven member Committee of Experts, but the Council of Europe has given interim application to the changes

states have respected their undertakings, and render legal opinions on whether the national laws and practices of the States Parties are in compliance with their obligations under the Charter. The ECSE transmits its conclusions to the Governmental Committee of the Council of Europe, which is composed of state representatives. The Governmental Committee presents its findings on compliance to the Committee of Ministers. The Committee of Ministers may then make the necessary recommendations to any of the High Contracting Parties.

The most significant change to the ESC system comes with the additional protocol providing for a system of collective complaints. While opening the process to non-state actors, the mechanism differs considerably from the judicial proceedings of the Court. First, the ESC procedure affords limited standing. It allows complaints of “unsatisfactory application of the Charter” to originate with one of several types of groups: international organizations of employers and trade unions participating in the work of the Governmental Committee; other international non-governmental organizations with consultative status with the Council of Europe and appearing on a special list drawn up by the Governmental Committee; and national organizations of employers and trade unions from the Contracting Party concerned. Each state may also declare that it accepts the right of its national non-governmental organizations to lodge complaints against it. Article 3 of the Protocol specifies that the “international non-governmental organizations and the national non-governmental organizations . . . may submit complaints . . . only in respect of those matters regarding which they have been recognized as having particular competence.”

The collective complaints are examined by the ECSR, which first determines admissibility and then examines admissible complaints on the basis of written submissions and possible hearings. The Committee prepares a report on its examination of the complaint and the conclusions reached. The report is transmitted to the Committee of Ministers, the complaining organization, and the States Parties. On the basis of the report, the Committee of Ministers adopts a resolution on the matter, which may contain recommendations to the State concerned. At the time the resolution is adopted, or four months after the Committee of Ministers receives the report, the Parliamentary

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foreseen by the 1991 Protocol and expanded the number of experts, also changing the name of the Committee.

Assembly also receives the report and makes it public. The State must submit information on its measures to comply with the recommendations made.<sup>46</sup>

In the first two years after the Protocol entered into force, ten complaints were registered. The first application, *International Commission of Jurists v. Portugal*,<sup>47</sup> complained of child labor in violation of Charter Article 7(1). The ECSR transmitted the report containing its decision on the merits to the Committee of Ministers which agreed that a violation had been shown.<sup>48</sup> The Committee then considered several consecutive complaints against France, Italy, Greece and Portugal concerning the right of armed forces to organize and collectively bargain. These cases are noteworthy because of the potential for conflicting jurisprudence between the ECSR and the ECHR; Article 11(2) of the ECHR expressly permits Contracting Parties to limit labor union rights for members of the armed forces. A complaint subsequently filed in the case *International Federation of Human Rights Leagues v. Greece* alleged forced labor.<sup>49</sup> The ECSR transmitted the report finding violations to the Committee of Ministers on December 12, 2000; the latter made recommendations to the Greek government.

The European Convention for the Prevention of Torture and its Protocols<sup>50</sup> supplements the ECHR by seeking to prevent the commission of torture through an innovative procedure of visits and in-

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46. Additional Protocol, *supra* note 38, art. 10.

47. Collective Complaint to the ECSR, Application No. 1/1998, *available at* <http://hudoc.esc.coe.int/search> (last visited Nov. 4, 2002).

48. Res. ChS (99) 4 (adopted by the Comm. of Ministers on Dec. 15, 1999 at the 692nd meeting of the Ministers' Deputies).

49. Collective Complaint to the ECSR, Application No. 7/2000, *available at* <http://hudoc.esc.coe.int/search> (last visited Nov. 4, 2002).

50. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, (entered into force Feb. 1, 1989), E.T.S. 126, *reprinted in* 27 I.L.M. 1152 (1988). Protocol 1 widens the geographical scope of the Convention by enabling states not members of the Council of Europe to accede to it by invitation. Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 4, 1993, (entered into force March 1, 2002), E.T.S. 151. Protocol 2 makes technical changes to the arrangements for elections of the members of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 4, 1993, (entered into force March 1, 2001), E.T.S. 152. The texts of the Protocols are reprinted in 1 INT'L HUM. RTS. REP. 339 (1994). *See* Antonio Cassese, *A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128 (1989); Malcolm Evans & Rod Morgan, *The European Convention for the Prevention of Torture: Operational Practice*, 41 INT'L & COMP. L.Q. 590 (1992).

spections to detention facilities. A Committee for the Prevention of Torture (CPT), composed of independent and impartial experts whose number is equal to that of the States Parties, has the power to visit places of detention of any kind, such as prisons, police cells, military barracks, and mental hospitals, to examine the treatment of detainees and, if appropriate, to make recommendations to the state concerned with a view to strengthening the protection of the detainees.<sup>51</sup> A principle of “cooperation” has led the Committee to exercise its functions in strict confidentiality. Publicity occurs only if a state requests publication of the Committee’s report, together with its comments,<sup>52</sup> or if a state fails to cooperate with the Committee or refuses to make improvements following the Committee’s recommendations.

The Committee carries out periodic visits to all Contracting Parties and may organize such *ad hoc* visits “as appear to it to be required in the circumstances.”<sup>53</sup> The Committee is obliged to notify the state concerned of its intention to carry out such a visit, but no specific period of notice is required. A visit may take place immediately after the notification in exceptional circumstances. Government objections to the time or place of a visit can be justified only on grounds of national defense, public safety, serious disorder, the medical condition of a person or an urgent interrogation in progress relating to a serious crime. In such cases the state must immediately take steps to allow the Committee to visit as soon as possible.

The newer European Charter for Regional or Minority Languages,<sup>54</sup> and the 1995 Framework Convention for the Protection of National Minorities<sup>55</sup> address problems of minority rights. The

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51. As of November 13, 2002, the CPT had made 95 periodic visits and 47 *ad hoc* visits.

52. Some 84 reports have been published in this way. In addition, the Committee’s annual report to the Committee of Ministers is made available as a public document.

53. See MALCOLM EVANS & ROD MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1998).

54. European Charter for Regional or Minority Languages, Nov. 5, 1992, (entered into force March 1, 1998), E.T.S. 148. Just 16 states have ratified the Convention as of March 26, 2002.

55. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, (entered into force Feb. 1, 1998), E.T.S. 15, *reprinted in* 2 INT’L HUM. RTS. REP. 217 (1995). The Convention has been accepted by more than two-thirds of the Member States of the Council of Europe, equally between western states and those of Central and Eastern Europe. The first four states to ratify have significant minority issues: Spain, Hungary, Romania and Slovakia. Yugoslavia, a non-Member State, is a party to the Convention. In addition, Armenia and Bos-

Framework Convention is so denominated because it is primarily a statement of principles rather than a detailed set of obligations. Supervision of compliance is done through a system of state reporting to the Committee of Ministers, assisted by an expert advisory committee. The Council of Europe has also taken up human rights problems posed by technological change, adopting the Convention for the Protection of the Individual with Regard to the Automatic Processing of Personal Data,<sup>56</sup> the Convention for the Protection of Human Rights and Biomedicine<sup>57</sup> and its Additional Protocol on the Prohibition of Cloning Human Beings.<sup>58</sup>

The Council of Europe also has developed extra-conventional procedures in an effort to prevent human rights violations from occurring. The Committee of Ministers has authorized specific monitoring procedures<sup>59</sup> while the Parliamentary Assembly has developed others. The Secretary-General of the Council of Europe, for exam-

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nia-Herzegovina both ratified the treaty before joining the Council of Europe. The term "framework," widely used in environmental agreements, indicates that the Convention sets forth general principles and objectives but does not specify the details of implementation by States Parties.

56. European Convention for the Protection of the Individual With Regard to the Automatic Processing of Personal Data, Jan. 28, 1981, (entered into force Oct. 1, 1985), E.T.S. 108. The Convention has been supplemented by the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Regarding Supervisory Authorities and Transborder Data Flows, Nov. 8, 2001, (not yet in force), E.T.S. 181; and the Convention on Cybercrime, Nov. 23, 2001, (not yet in force).

57. The Convention on Human Rights and Biomedicine, Apr. 4, 1997, (entered into force Dec. 1, 1999), E.T.S. 164, is the first international treaty designed to preserve human rights in the context of medical treatment and research. The Convention insists that "the interests and welfare of the human being shall prevail over the sole interest of society or science." *Id.* art. 2. The Steering Committee on Bioethics (CDBI), or any other committee designated by the Committee of Ministers or the Parties may request the European Court of Human Rights to give advisory opinions on legal questions concerning the interpretation of the Convention. See Eibe Riedel, *Global Responsibilities and Bioethics: Reflections on the Council of Europe's Bioethics Convention*, 5 IND. J. GLOBAL LEG. STUD. 179 (1997).

58. Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Jan. 12, 1998, (entered into force Mar. 1, 2001), E.T.S. 164. The Protocol prohibits "any intervention seeking to create a human being genetically identical to another human being, whether living or dead." *Id.* art. 1. It rules out any exception to this ban, even in the case of a sterile couple and bars States Parties from derogating to the provisions of the Protocol. *Id.* art. 2. A second Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin was adopted Jan. 24, 2002, E.T.S. 186. It is not in force as of Nov. 4, 2002.

59. Andrew Drzemczewski, *The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe*, in THE PREVENTION OF HUMAN RIGHTS VIOLATIONS 139 (Linós-Alexander Sicilianos ed., 2001).

ple, has been attributed monitoring powers by paragraph 1 of the 1994 Committee of Ministers Declaration on Compliance with Commitments<sup>60</sup> and by the Declaration on the Protection of Journalists in Situations of Conflict and Tension.<sup>61</sup> The European Convention on Human Rights itself gives the Secretary General power to request Contracting Parties to furnish an explanation of the manner in which their internal laws ensure the effective implementation of the provisions of the Convention.<sup>62</sup>

The 1993 Declaration adopted by the Council of Europe Heads of State and Government, meeting at the Vienna Summit, included a commitment to combat racism, xenophobia, anti-Semitism and intolerance.<sup>63</sup> The follow up involved creation of a new mechanism, the European Commission against Racism and Intolerance (ECRI), established to review Member States' legislation, policies and other measures to combat racism and intolerance and to propose further action at local, national and European levels. ECRI monitors the situation through an in-depth study of the situation in each of the Member States followed by specific proposals designed to solve current problems or remedy deficiencies. Draft texts are communicated to national liaison officers to allow national authorities to respond with observations. After the confidential dialogue, ECRI adopts a final report and submits it to the state concerned through the Committee of Ministers. State reports are made public two months after transmission to the government unless the government expressly objects. ECRI has completed a first round of reviews and aims to do 10 country reports annually during its second monitoring period.

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60. See Declaration on Compliance with Commitments, *supra* note 8.

61. Declaration on the Protection of Journalists in Situations of Conflict and Tension, Comm. of Ministers, May 3, 1996, at <http://cm.coe.int/ta/decl/1996/96dec2.html> (last visited Oct. 3, 2002). Paragraph 7 of the Declaration provides that the Secretary General may speedily take all appropriate action on receipt of reports of infringement of rights and freedoms of journalists in Member States in situations of conflict and tension. See also *Recommendation of the Comm. of Ministers*, Eur. Consult. Ass., 98th Sess., Doc. No. R (96) 4 (1996).

62. European Convention on Human Rights, *supra* note 1, art. 52 (formerly art. 57, amended by Protocol No. 11, *supra* note 16, art. 2). The Secretary General has requested information from all states on five occasions (1964, 1970, 1975, 1983, and 1988). On December 13, 1999, for the first time information was requested of a single state, the Russian Federation, concerning the situation in Chechnya. On the earlier requests, see Vojin Dimitrijevic, *The Monitoring of Human Rights and the Prevention of Human Rights Violations through Reporting Procedures*, in MONITORING HUMAN RIGHTS IN EUROPE 1 (Arie Bloed et al. eds., 1993).

63. Appendix III, Vienna Summit Declaration, Oct. 9, 1993, at <http://www.coe.fr/eng/std/viennad.htm> (last visited Oct. 2, 2002).

The Parliamentary Assembly has created a monitoring mechanism to verify compliance with obligations and commitments of all Council of Europe Member States.<sup>64</sup> A monitoring committee is responsible for verifying the fulfillment of obligations assumed by Member States under the terms of the Council of Europe Statute, the European Convention and all other Council of European human rights conventions, as well as the honoring of commitments entered into by the States' authorities upon accession to the Council of Europe. The procedure permits the Assembly to sanction persistent non-compliance by adopting resolutions and recommendations, by not approving the credentials of a national parliamentary delegation, or ultimately by recommending action to the Committee of Ministers.

Finally, the Council of Europe created the post of Commissioner for Human Rights on May 7, 1999.<sup>65</sup> The Commissioner is elected by the Parliamentary Assembly from a list of candidates drawn up by the Committee of Ministers and serves a non-renewable six-year term. The functions of the independent and impartial Commissioner are to serve as "a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe."<sup>66</sup> The functions are thus primarily promotional and preventive; the Commissioner has no power to accept communications. In the exercise of his functions, the first Commissioner undertook a fact-finding visit to the Russian Federation soon after taking office and submitted a report to the Committee of Ministers and the Parliamentary Assembly on the situation in Chechnya.<sup>67</sup>

In sum, the Council of Europe has moved from a system of human rights protection based solely on litigation to a complex network of interlocking bodies focused on standard-setting, prevention, monitoring and enforcement. It remains to be seen whether, in the long term, the new procedures will alleviate the increasingly untenable growth in the Court's caseload.

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64. EUR. PARL. ASS. RES. 1115 (Jan. 29, 1997). The Resolution abrogated Order No. 508 (1995) on obligations and commitments by Member States of the Council of Europe.

65. *Resolution of the Comm. of Ministers*, Eur. Consult. Ass., 104th Sess., Res. (99) 50 (1999).

66. *Id.* art. 1.

67. Drzemczewski, *supra* note 59, at 154 n.33.

## B. The European Union

Outside the Council of Europe and following its creation, six of its original States Parties<sup>68</sup> moved to reduce economic barriers between them through establishing the European Communities.<sup>69</sup> The absence of human rights protections posed increasing problems as the role and powers of the European Communities expanded and its legislative and administrative activities had a growing impact on the rights of individuals and companies.<sup>70</sup> In an evolution parallel to that of the Council of Europe, the Communities have subsequently enlarged their membership<sup>71</sup> and increased the power of their institutions,<sup>72</sup> eventually forming, first, the combined European Community (EC) and then the European Union (EU),<sup>73</sup> of which the European Community is one of the Three Pillars. The other two pillars are

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68. The original members of the European Communities were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

69. The European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC) comprise the three communities that are part of the European Union. See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (to expire in 2002); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, amended by the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter TEU or Maastricht Treaty], and the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter the Treaty of Amsterdam]. A consolidated version of the various changes appears as the Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997).

70. The EC has legislative powers to adopt directives and regulations binding on its Member States, with the aim of harmonizing or unifying laws and policies in the region on matters within EC jurisdiction.

71. There are 15 Member States today: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Almost as many states have applied for membership: Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia, and Turkey. *The EU at a Glance*, at <http://europa.eu.int/abc-en.htm> (last visited Nov. 4, 2002).

72. The four basic institutions of the EC are the Council, the Commission, the Parliament and the Court. The Council is the primary policy-making body with one representative from each state. The Commission has 20 members, each of whom is responsible for one or more of the 26 directorates that govern various activities of the EC. Together they employ about 20,000 civil servants. The Commission also has exclusive power to initiate legislative acts. The Parliament, consisting of 626 members, is directly elected and participates in the legislative process but does not have full law-making powers. The Court consists of 15 judges, one from each Member State. See *Institutions of the European Union*, at <http://europa.eu.int/inst-en.htm> (last visited Nov. 9, 2002).

73. Treaty on European Union, Aug. 31, 1992, O.J. (C 224).



common foreign and security policy, and police and judicial cooperation in criminal matters, set out in the Treaty of European Union (TEU) Titles V and VI respectively.

Initially, the treaties creating the Communities contained few human rights guarantees,<sup>74</sup> being primarily concerned with economic integration. The ECJ first announced in *Van Gend en Loos*,<sup>75</sup> and then in *Costa v. ENEL*,<sup>76</sup> the basic principle that EC law prevails over Member States' national laws. The resulting doctrines of direct applicability and direct effect ensured the supremacy of Community law, but it appeared that no human rights system applied to Community institutions in the exercise of their supranational powers.<sup>77</sup> German and Italian courts almost immediately raised concerns about the supremacy of EC law should it run afoul of constitutional protections for human rights.<sup>78</sup>

To fill the human rights gap and ensure the continued supremacy of EC law,<sup>79</sup> the European Court of Justice (ECJ) declared in a series of decisions that respect for fundamental rights forms an integral part of the general principles of law which the Court is required to apply in interpreting the Community treaties.<sup>80</sup> In *Stauder v. City of Ulm*, the ECJ declared that a doctrine of fundamental human rights was enshrined as a general principle of Community law and was protected by the Court.<sup>81</sup> In *Internationale Handelsgesellschaft*,<sup>82</sup> the ECJ an-

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74. A few provisions contained specific guarantees. See, e.g., EC Treaty, art. 6 [1992] C.M.L.R. 591 (non-discrimination on grounds of nationality); Consolidated EC Treaty, art. 141, O.J. (C 340/3) 242 (1997) (art. 119 of EC Treaty) (principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including equal pay for equal work or work of equal value).

75. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1, 2 C.M.L.R. 105 (1963).

76. Case 6/64, *Costa v. ENEL*, [1964] E.C.R. 585, 3 C.M.L.R. 425 (1964).

77. Direct applicability derives from Article 249 (regulations are directly applicable in all Member States) while the doctrine of direct effect generally provides that Community law that is clear, precise, and unconditional, such that no further action is required by Community or national authorities, may be enforced by private parties before national institutions. See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 206–07, 215 (34th ed. 1994).

78. See Case 29/69, *Erich Stauder v. City of Ulm, Sozialamt*, [1969] E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, [1970] E.C.R. 1125, 11 C.M.L.R. 225 (1972); *Frontini v. Ministero delle Finanze*, 2 C.M.L.R. 372 (1974).

79. The concern with human rights led some national courts to suggest that EC law incompatible with basic rights would not be implemented or given domestic effect. See *Internationale Handelsgesellschaft*, *supra* note 78.

80. As early as 1970, the ECJ found human rights to be an integral part of Community law. *Id.*

81. Case 29/69, *Stauder v. City of Ulm*, [1969] E.C.R. 419, 9 C.M.L.R. 112 (1970).

nounced a principle of autonomous human rights law, i.e., that the validity of EC law would be judged by the EC's own criteria for fundamental human rights. In the *Nold* case,<sup>83</sup> the Court of Justice held that

[F]undamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. In safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines, which should be followed within the framework of Community law.

Over time, both the basic legal instruments and the jurisprudence of the Court have evolved to expand the rights of individuals, not just in the economic field, but in regard to political rights as well.<sup>84</sup> In ascertaining the nature of these rights the Court looks to the European Convention on Human Rights, including the case law of the European Court of Human Rights. Thus, for Community acts to be constitutional, they must be compatible with the requirements of the protection of fundamental rights in the Community legal order.<sup>85</sup> Further, to the greatest extent possible, Member States must apply Community law in accordance with their human rights obligations.<sup>86</sup> The ECJ has also held, in the seminal decision *Francovich v. Italy*,<sup>87</sup> that Member States can be liable for breaching Community law if they fail to implement directives. This vindication of individual rights ensures a remedy against Member States even when the direct source of the violation is a private actor.<sup>88</sup>

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82. *International Handelsgesellschaft*, *supra* note 78.

83. Case 4/73, *Nold, Kohlen und Baustoffsgroßhandlung v. Comm'n*, [1974] E.C.R. 491, 507, 2 C.M.L.R. 183 (1978).

84. TEU art. 8b creates citizens' rights to vote and stand as candidates in European elections throughout the Union. Article 8d contains a right to petition the European Parliament. Treaty on European Union, Aug. 31, 1992, O.J. (C 224). EC documents on environmental protection stress rights of information, public participation and redress. See ALEXANDER KISS & DINAH SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* (2d ed. 1999).

85. Case 5/88, *Wachauf*, [1989] E.C.R. 2609, 2639, 60(1) C.M.L.R. 328.

86. *Id.*

87. Cases C-6/90 and C-9/90, *Francovich v. Italy*, [1991] E.C.R. I-5357, 67(2) C.M.L.R. 328 (1993).

88. Compare Case 152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] E.C.R. 723 with *Duke v. Reliance*, [1988] 1 All

This jurisprudence does not mean, however, that the ECJ can review the compatibility of national laws or practices with the ECHR or other human rights law outside the scope of Community law.<sup>89</sup> Such cases should remain within the jurisdiction of the European Court of Human Rights. Even after changes introduced by the TEU and Treaty of Amsterdam, described below, the protection of human rights generally is not listed as one of the express purposes of the EC or one of the powers expressly conferred upon it, meaning national laws as they affect human rights remain outside Community reach so long as they do not impact Community law or policies.

Changes in EC law in favor of human rights have occurred, however. The preamble to the Maastricht Treaty, which transformed the European Community into the European Union, declared that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention [of] . . . Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”<sup>90</sup> The inclusion of this language, derived from ECJ judgments, appears to constitute an express acceptance of the ECJ’s approach by the Member States of the Union.

The concern for human rights reflected in the Maastricht Treaty preamble is reinforced in Article 2 of the revised Treaty of European Union (Treaty of Amsterdam)<sup>91</sup> which includes among the EU objectives “to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union” and “to maintain and develop the Union as an area of freedom, security and justice . . . .” Using language from the former Preamble, Article 6(1) provides that the Union “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,” while Article 6(2) requires that the Union respects fundamental rights guaranteed by the European Convention and the constitutional traditions common to

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E.C.R. 626 (H.L. 1988). In the first case the EC Equal Treatment Directive gave the applicant a remedy against a public authority that failed to comply with EC law. In the second case, the applicant could not rely upon the directive in an action against a private company. The *Francovich* case fills this gap by allowing applicants to hold the state liable for failing to impose the directive on private parties through transposition into domestic law.

89. See Case C-299/95, *Kremzow v. Austrian State*, [1997] E.C.R. I-2629, 3 C.M.L.R. 1289 (1997); Case 12/96, *Demirel*, [1987] E.C.R. 3719, 3754, 1 C.M.L.R. 421, 439–40 (1989); Joined Cases 60–61/84, *Cinetheque*, [1985] E.C.R. 2605, 2627, 1 C.M.L.R. 365, 386 (1986).

90. TEU, Preamble, para. F(2), reprinted in 36 I.L.M. 253, 256 (1992).

91. Treaty of Amsterdam, *supra* note 69.

the Member States as general principles of Community law. Further, Article 7 specifies a procedure that can result in suspension of membership rights if a “serious and persistent” breach of human rights occurs in a Member State.<sup>92</sup> The Treaty also strengthens the protection against discrimination<sup>93</sup> and makes human rights an objective of the common foreign and security policy.<sup>94</sup> Perhaps most importantly, TEU Article 46(d) gives the ECJ jurisdiction over compliance with Article 6(2), thereby making human rights broadly justiciable so long as the issue presented in the case is linked to Community law.

In a process parallel to that developed by the Council of Europe, the EU Member States have enunciated criteria that must be met by states applying to join. First, the “Copenhagen Guidelines” adopted at the 1993 EC Summit, state:

The candidates must achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for the protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the union; and the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>95</sup>

Second, the Commission has deemed that the foundational principles listed in the Treaty of Amsterdam Article 6 establish formal criteria for membership.<sup>96</sup>

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92. See generally HENRY SCHERMERS & DENIS. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 37 (5th ed. 1992); THE EUROPEAN UNION AND HUMAN RIGHTS (Nanette Neuwahl & Allan Rosas eds., 1995); THE EU AND HUMAN RIGHTS (P. Alston ed., 1999); Flaherty & Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249 (1998); Lenaerts, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, 6 COLUM. J. EUR. L. 1 (2000).

93. See, e.g., arts. 2 (promotion of equality between men as women as a task of the Community), 3(2) (in all activities the Community shall aim to eliminate inequalities and to promote equality), 12 (prohibiting discrimination on the grounds of nationality), 13 (Council, acting unanimously on a proposal from the Commission and after consulting the Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) and 141 (co-decision process to adopt measures to ensure the application of the principle of equal opportunities and equal treatment for men and women).

94. Art. 11, Treaty of Amsterdam (“The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be . . . to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.”).

95. E.U. Bull. No. 12, Supp. 5, at 39 (1997); see also Conclusions of the Presidency, E.C. Bull. No. 6, pt. I.13 (1993).

96. Consolidated TEU, art. 6, O.J. (340/2) 153 (1997), 37 I.L.M. 13.

Despite these advances, the precise obligations of organs of the Communities remain unclear in the absence of an EU Bill of Rights. Accession to the ECHR appears unlikely. The Court of Justice has determined in an advisory opinion, that the Community lacks competence to accede to the European Convention on Human Rights absent amendment of the Treaty.<sup>97</sup> In the advisory opinion, the Court noted that no provision of the Treaty establishing the European Community confers on the Community institutions any general power respecting human rights. Nor can the Treaty's "necessary and proper" clause<sup>98</sup> provide authority, because adherence to the Convention would entail such a substantial change in the Community human rights system that the modifications produced by adherence "would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235."<sup>99</sup> There is little likelihood of Treaty amendment followed by accession, because EU Member States are reluctant to turn over to the larger membership of the Council of Europe the task of balancing individual rights with Community economic and general interests.

The Treaty of Amsterdam nonetheless somewhat strengthens the ECJ's jurisdiction over human rights. Article 46(d), as noted above, confers jurisdiction on the Court to review the acts of the institutions for conformity with Article 6, which requires that the Union respect fundamental rights. The Court is required to ensure that the law is observed in the interpretation and application of the Treaty.<sup>100</sup> Article 46 also expressly enables the Court to examine the compatibility of "action of the institutions" with fundamental rights in regard to police and judicial cooperation in criminal matters.

For most subject areas, the Court's jurisdiction rests on Article 220. This provision allows the Court to examine the compatibility of Member States' legislation with the fundamental rights protected within the Community legal order when such legislation implements

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97. Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, [1996] E.C.R. I-1759.

98. Formerly Article 235, now Article 308, gives the Community broad implied powers.

99. Accession Opinion, *supra* note 97, at 1789.

100. *Id.* The Court stated in its advisory opinion on accession that "it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures." See Gil. Carlos Rodríguez Iglesias, *The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities*, 1 COLUM. J. EUR. L. 169 (1995); Akos Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 492, 493 (1997) (arguing that opinion 2/94 undermines this well accepted thesis).

Community rules or relies upon Community law to justify national measures affecting the common market. Several exceptions are provided to exclude matters from the Court's jurisdiction, especially as they relate to policing and internal security measures.<sup>101</sup> These subjects may be reviewable by the European Court of Human Rights, but the Court has been deferential to the Community in most of its decisions,<sup>102</sup> finding that the European Community is itself a legal system that secures fundamental rights and provides for control of their observance.<sup>103</sup> Where such control is lacking because the ECJ lacks jurisdiction, the European Court of Human Rights may be more willing to exercise its own jurisdiction to protect human rights.<sup>104</sup>

Although the Treaty of European Union was not amended in the manner the Court suggested (to allow adhesion to the European Convention), the EU decided in June 1999 to draft a European Charter of Fundamental Rights to cover all rights that pertain to the Union's citizens, in effect combining the guarantees of the European Convention on Human Rights, the European Social Charter, and other human rights instruments. The Charter was proclaimed at the meeting of the Council of the European Union in Nice on December 18, 2000,<sup>105</sup> but it was not adopted as a treaty, due to lack of agreement among the Member States. However, the European Parliament has recommended that it be incorporated into the EU Treaty<sup>106</sup> and

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101. See, e.g., art. 35(5) TEU, excluding review of operations carried out by the police or other law enforcement services or measures taken with regard to the maintenance of law and order and safeguarding of internal security; and article 68(2), excluding jurisdiction over any measure or decision relating to the maintenance of law and order and the safeguarding of internal security in respect to matters concerning visas, asylum, immigration and similar policies.

102. See, e.g., *M. & Co. v. Germany*, 64 Eur. Ct. H.R. 138 (1990); *Pafitis & Others v. Greece*, 27 Eur. Ct. H.R. 566 (1999); but see *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361 (1999).

103. *M. & Co.*, *supra* note 102, at 138.

104. See *Matthews v. United Kingdom*, *supra* note 102 (holding the denial of voting rights in Gibraltar for election of representatives to the European Parliament by direct universal suffrage incompatible with the European Convention on Human Rights).

105. Charter of Fundamental Rights of the European Union, O.J. (C 361/1) (2000). See Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15/16 TUL. EUR. & CIV. L.F. 43, 44 (2000-01).

106. The European Parliament supported a mandatory Charter incorporated in the Treaties, in two resolutions. See Resolution A5-0064/2000 of the European Parliament on the elaboration of a Charter of Fundamental Rights of the European Union: minutes of the plenary session of March 16, 2000, and Resolution B5-767/2000 of the European Parliament on the Charter of Fundamental Rights: minutes of the plenary session of Oct. 3, 2000. The Economic and Social Committee and the Committee of the Regions also favor incorporation. See Economic and Social Committee Resolution 1005/2000 (Sept. 20, 2000), and Committee of the Regions Resolution 140/2000 (Sept. 20, 2000).

the Commission has agreed.<sup>107</sup> The Commission's opinion is that the Charter may be regarded at present, even by the ECJ, as an important source of binding principles of fundamental rights.

The Charter is divided into six chapters. Chapter I, entitled "Dignity," begins with a declaration that "human dignity is inviolable. It must be respected and protected." The remainder of the first chapter contains rights on the integrity of the person, the prohibition of torture, inhuman and degrading treatment and punishment, slavery and forced labor. These provisions are modeled directly on the ECHR and must be interpreted in the light of the jurisprudence of the European Court of Human Rights, according to Charter Article 52(3).

Chapter II contains freedoms of expression, religion, privacy, liberty and security, assembly, association, and the right to property, including intellectual property. Although the chapter is named "Freedoms," some of the rights it contains involve the state's provision of services. For example, it includes the right to education and access to vocational and continuing education. While most of the rights are based on the ECHR, the freedom to choose an occupation and to engage in work<sup>108</sup> and the freedom to conduct a business<sup>109</sup> are derived more directly from Community law and the jurisprudence of the ECJ.

Chapter III is devoted to issues of equality and non-discrimination, including group rights to cultural, religious and linguistic diversity. Children, the elderly and persons with disabilities are given particular protection. Chapter IV is entitled "Solidarity" and it includes many of the rights in the European Social Charter. The right of collective bargaining and the right to strike are included, as are protections against wrongful termination and unsafe working conditions. Protections are also afforded for the family, social security and health care. Chapter V follows with political rights, including the right to vote and stand for election, freedom of movement, the right of petition, and the right to diplomatic protection. Good governance or administration is also included in Chapter V and extends the right of access to public documents to all citizens of the Union.

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107. Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM(00) 644 final Oct. 11, 2000, *available at* [http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000\\_0644en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0644en01.pdf) (last visited Sept. 29, 2002).

108. Charter of Fundamental Rights of the European Union, *supra* note 105, ch. 2, art. 15.

109. *Id.* art. 16.

Chapter VI concerns justice and includes the right to an effective remedy and a fair trial. The presumption of innocence and the right to defense for those accused of criminal offenses follow, as well as provisions on the proportionality of penalties and the principle of *nonne bis in idem* (no repeated trials for the same offense). The Charter also includes objectives and principles, such as integrating a high level of environmental protection and consumer protection into policies of the Union, that are not stated as rights.<sup>110</sup>

In sum, human rights find protection in the EU today through the revised TEU,<sup>111</sup> the jurisprudence of the ECJ, and to some extent, the Charter of Fundamental Rights. Other EC institutions also act in regard to human rights. The EC signs OSCE documents through its president<sup>112</sup> and EC employees sometimes participate in OSCE meetings as delegation members. In addition, the Parliament's Human Rights Sub-Committee produces an annual report on human rights in countries throughout the world.<sup>113</sup>

### C. The Organization for Security and Cooperation in Europe

The third institution that has taken on broad human rights functions in Europe<sup>114</sup> is the Organization for Security and Cooperation in Europe (OSCE), formerly the Conference on Security and Cooperation in Europe (CSCE).<sup>115</sup> Emerging from efforts to lessen Cold War hostilities, the Helsinki Final Act (HFA),<sup>116</sup> which concluded the Con-

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110. Charter of Fundamental Rights of the European Union, *supra* note 105, arts. 37–38.

111. The Treaty of Rome establishing the EEC itself contained certain rights: the right not to be discriminated against on the grounds of nationality (arts. 6, 40(5), 67(1), and 68(2)), equal pay for equal work (art. 119), a freedom of movement (art. 48(1)). The TEU adds the right to vote and stand for election to the European Parliament (art. 8b) and rights of citizenship in the Union (art. 8). In addition, the TEU makes explicit reference to the European Convention on Human Rights in art. K.2(1) and art. F(2).

112. Erika Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972-1990*, 12 HUM. RTS. L.J. 221, 230 (1991).

113. See, e.g., European Parliament, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, *Annual Report on Human Rights in The World in 2000 and the European Union Human Rights Policy*, EUR. PARL. DOC. (A5 – 0193/2001 final) 1 (2001).

114. Note that the United States and Canada are also participating states, making the OSCE a transatlantic, rather than purely European institution.

115. The CSCE changed its name to OSCE in 1994 to reflect its growing institutional structure and procedures. For a description of the evolution and changes, see OSCE HANDBOOK 12–16 (2000), available at <http://www.osce.org/publications/handbook/files/handbook.pdf> (last visited Nov. 9, 2002).

116. Final Act of the Helsinki Summit, Aug. 1, 1975, available at <http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm> (last visited Oct. 1, 2002).



ference on Security and Cooperation in Europe in 1975, brought human rights into the context of regional peace and security.<sup>117</sup> The HFA consists of four chapters or “baskets.”<sup>118</sup> Human rights issues are addressed primarily in the Guiding Principles proclaimed in Basket I and to some extent in Basket III. Of the 10 Guiding Principles set out in the HFA, two deal with human rights. In Principle VII, the participating States undertake to “respect human rights and fundamental freedoms” and to “promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms. . .”, respect freedom of religion, the rights of individuals belonging to national minorities, and the “right of the individual to know and act upon his rights and duties in this field.” In the last paragraph of Principle VII, the participating States agree to

act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.<sup>119</sup>

Principle VIII for its part devotes four paragraphs to the subject of “equal rights and self-determination of peoples.”<sup>120</sup>

The various follow-up meetings to the Helsinki Conference strengthened human rights protections, sometimes adding details not found in other regional or global instruments.<sup>121</sup> The follow-up con-

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117. The CSCE opened at Helsinki in July 1973 and concluded two years later with the adoption of the Helsinki Final Act. The Final Act is not a treaty but sets forth political commitments in the areas of security, cooperation and human rights.

118. Basket I, entitled “Questions Relating to Security in Europe,” consists of two sections (“Principles Guiding Relations Between Participating States,” and “Confidence-Building Measures and Certain Aspects of Security and Disarmament”). Basket II deals with “Cooperation in the Field of Economics, of Science and Technology and of the Environment.” The subject of Basket III is “Cooperation in Humanitarian and Other Fields.” Basket IV, the final chapter of the instrument, spells out the so-called “follow-up” process. See Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AM. J. INT’L L. 242, 243 (1976).

119. Final Act of the Helsinki Summit, *supra* note 116.

120. The participating states recognize that “all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference. . . .” *Id.* See generally HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990); THE MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); R. STEINHARDT, INTERNATIONAL LAW AND SELF-DETERMINATION (1994).

121. Follow-up conferences have been held in Madrid (1983), Vienna (1989), Copenhagen (1990) and Budapest (1994). The Madrid meeting focused on the issue of trade union freedoms in light of the advent of the Solidarity movement in Poland. Specific and detailed guarantees

ferences have been used to review compliance with human rights commitments and develop a mechanism for expanding the list of guaranteed rights. The meetings have also been used to focus public attention on the failure of certain states to live up to their human rights commitments. In this context, various CSCE meetings have made specific references to and commitments regarding national minorities.

The Vienna Concluding Document established the Human Dimension Mechanism for dealing with the non-observance by states of their human dimension commitments. Subsequent OSCE conferences have expanded the scope of the Mechanism in order to make it more effective. It is now a process of bilateral and multilateral negotiations which obliges participating states to respond to requests for information and allows states to bring situations and cases to the attention of other participating states. Thus, when one or more states claim that another state is not living up to its OSCE commitments regarding the human dimension, a diplomatic exchange between the states concerned follows, for which specific time-limits are provided. If the matter is not resolved between them, a state may bring it to the attention of all OSCE states and place the matter on the agenda of OSCE follow-up or human dimension conferences. In addition, the Moscow Mechanism allows appointment of OSCE expert missions or rapporteur missions to investigate questions or problems relating to the human dimension. The Mission may be invited by the state concerned or initiated at the request of six or more participating states. In emergency situations, a participating state may request a meeting of the OSCE Senior Council, which may take action. Finally, an early warning mechanism allows either state involved in a dispute, a group of eleven states not involved in the dispute, the High Commissioner on National Minorities, or the Permanent Council to draw the attention of the Senior Council to any situation having the potential to develop into a crisis.<sup>122</sup> In 1992, the CSCE established the office of the

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regarding freedom of religion, non-discrimination, minority rights, freedom of movement, conditions of detention and capital punishment were added at the Vienna meeting. See CSCE, Concluding Document of the Vienna Follow-Up Meeting (1989). Copenhagen also resulted in considerable human rights standard-setting, especially concerning national minorities. It was also one of the first documents to refer to the right of conscientious objection to military service, a right not contained in the European Convention on Human Rights.

122. See OSCE, HANDBOOK, *supra* note 115, at 49–50.

High Commissioner on National Minorities (HCNM)<sup>123</sup> in order to address potential conflicts posed by minority issues. The mandate of the HCNM is to provide “early warning” and, as appropriate, “early action” where tensions involving national minority issues have not yet developed but could develop into a conflict within the CSCE area, affecting peace, stability or relations between participating states. The principal function of the HCNM is thus to address minority problems before they degenerate into serious conflicts by mediating and providing advisory services to governments and national minorities.<sup>124</sup>

Still without a constituting treaty, the OSCE tends to focus on human rights issues primarily through diplomatic intervention for conflict-prevention and mediation. The OSCE has also been engaged in developing regional democracy, linking it with human rights. An Office for Democratic Institutions and Human Rights, established in Warsaw, assists the democratization process in OSCE states and monitors the implementation of OSCE commitments regarding the human dimension. Parallel to the OSCE efforts, the Council of Europe created a program in 1990 to strengthen democracy and to facilitate the integration of new Member States into the Council of Europe.<sup>125</sup>

The success of the HCNM led the OSCE in 1997 to establish the post of Representative on Freedom of the Media (“Representative”) in order to address “serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for

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123. See CSCE Helsinki Document 1992, *The Challenges of Change*, ch. II, paras. 2–7, at 7 (July 10, 1992), <http://www.osce.org/docs/english/1990-1999/summits/hels92e.pdf> (last visited Oct. 30, 2002) (spelling out the mandate of the HCNM). See also Arie Bloed, *The CSCE and the Protection of Minorities*, in *THE UN MINORITY RIGHTS DECLARATION 95* (Alan Phillips & Allan Rosas eds., 1993); *MAJORING IN MINORITIES: MINORITY RIGHTS IN EUROPE: MINORITY RIGHTS IN THE ‘NEW’ EUROPE* (Peter Cumper and Steven Wheatley eds., 1999).

124. See Diana Chigas, *Bridging the Gap Between Theory and Practice: The CSCE High Commissioner on National Minorities*, 5 *Helsinki Monitor*, No. 3, at 27–28 (1994) (explaining the context of the HCNM’s preventative mandate); see also Conrad J. Huber, *Preventing Ethnic Conflict in the New Europe: The CSCE High Commissioner on National Minorities*, 1 *CSCE Bulletin*, No. 3, at 17 (ODIHR, 1993); see generally W. ZELLNER, *ON THE EFFECTIVENESS OF THE OSCE MINORITY REGIME* (1999).

125. See generally Andrew Drzemczewski, *The Council of Europe’s Co-operation and Assistance Programmes with Central and Eastern European Countries in the Human Rights Field: 1990 to September 1993*, 14 *HUM. RTS. L.J.* 229 (1993) (explaining the Council of Europe’s Co-operation and Assistance Programs both generally and on a country specific basis).

journalists.”<sup>126</sup> The Representative acts as an advocate, observing relevant media developments in OSCE participating states and promoting compliance with OSCE principles and commitments regarding freedom of expression and free media, including the use of hate speech.<sup>127</sup> The Representative also provides early warning on violations of freedom of expression, concentrating on rapid response to serious non-compliance with OSCE principles and commitments by participating states. Where problems arise, the Representative seeks direct contacts with the participating state and other parties involved, assesses the facts and tries to resolve the issue. The Representative reports to the Permanent Council, recommending further action where appropriate.

The OSCE has a comparative advantage in conflict prevention because the Council of Europe is not a security organization and its mandate is limited. The OSCE has also taken action on some situations where the Council of Europe and the United Nations have been inactive, such as with regard to citizenship and language laws in Estonia and Latvia, and the language law in Slovakia.<sup>128</sup> On the other hand, the complaints procedure of the European Convention has no parallel in the OSCE. The political character of OSCE commitments precludes judicial enforcement or complaints procedures, but allows rapid response in periods of crisis. It can thus be seen to supplement, but not replace the pre-existing European system. More generally, the views and messages of various regional bodies may reinforce each other, provided there is cooperation and coordination to avoid forum shopping by governments and contradictory messages from European institutions. When the rights guaranteed by the various human rights instruments differ in scope or breadth, European institutions could adopt a principle calling for application of the “rule most favorable to the individual” to ensure the widest protection for human rights and avoid conflicts in jurisprudence. However, where two or more rights are invoked in a specific matter and either conflict or are in tension, such as in the case of freedom of expression and the right to be free

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126. PC.DEC/193, Mandate of the OSCE Representative on Freedom of the Media, OSCE Perm. Council, 137th plen. mtg., 137 P.C.J. Agenda item 1 (Nov. 5, 1997), PC Journal No. 137, Dec. No. 193, para. 2.

127. The European Court of Human Rights also has been concerned with hate speech in the context of the right to freedom of expression. See *Jersild v. Denmark*, discussed *infra* note 162 et seq.

128. For reports on these situations, see OSCE High Commissioner on Human Rights Reports, available at <http://www.osce.org/hcnm/documents/reports/> (last visited Nov. 9, 2002).

from incitement to racial discrimination or hate speech, the different institutions may view the appropriate balance in different ways and signal different obligations for states. The proliferation of European human rights bodies makes these potential conflicts more likely to arise in practice in the future.

## II. JURISDICTION AND ROLE OF THE EUROPEAN COURTS

The litigation-based human rights system of the Council of Europe is undoubtedly the best known aspect of its monitoring of the human rights performance of Member States. Similarly, the EU developed its human rights doctrine through the jurisprudence of the ECJ. In recent years, however, other procedures have emerged and become important, including the inspection process of the European Torture Convention, the conciliation work of ECRI, and the country reports of the European Parliament. To some extent, these new procedures reflect the borrowing of successes from other national and international institutions. They also reflect a shift of power as the Parliamentary Assembly and European Parliament increasingly demand and play a role. To some extent their expanding functions may also respond to concerns about transparency and democratic participation in regional organizations.

For the European Court of Human Rights, Protocol No. 11 fundamentally changed the system,<sup>129</sup> abolishing the Commission and giving individuals direct access to the Court to bring actions against any State Party to the Convention.<sup>130</sup> Protocol 11 also introduced a

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129. Protocol No. 11 retains some elements of the prior system. The conditions of admissibility are unchanged, although with an entirely new court there may be differences of interpretation. Friendly settlement is still encouraged and can be seen as comparable to pre-trial settlement conferences that exist in national legal systems. More controversially, the judge of the nationality of the defendant state will continue to sit as a member of a Chamber or Grand Chamber, maintaining a sense of special pleading and deference to state interests. While national judges have not generally sought to restrict application of human rights guarantees in favor of their state or had obvious influence on the outcome of cases, the presence of new judges from countries with little or no tradition of an independent judiciary could pose problems for the future. However, with 37 languages used by applicants, the national judge may be the only one capable of reading the file and having knowledge of local conditions. On balance, as long as the quality and integrity of individuals selected as judges remains high, the benefits of having the national judge on a case probably outweigh the perception of partiality.

130. For a comprehensive account of the petition procedure, see generally LUKE J. CLEMENTS ET AL., *EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION* (2d ed. 1999).

limited “appellate” procedure.<sup>131</sup> A Grand Chamber of 17 judges now has jurisdiction to review decisions of any seven member Chamber if the case raises a “serious question affecting the interpretation or application of the Convention or protocols thereto, or a serious issue of general importance”<sup>132</sup> and a panel of five judges of the Grand Chamber decides that it is appropriate to do so after a request from one of the parties.<sup>133</sup> Although there is no explicit reference to intra-Chamber conflicts in interpreting and applying the Convention, the Grand Chamber could serve to ensure consistency of jurisprudence by resolving any such conflicts. The Grand Chamber conducts *de novo* review of cases referred to it, including admissibility of the complaint if the issue is raised.

The ECJ has also developed jurisprudence concerning its role within the Union to ensure respect for human rights by Member States and Community institutions. The treaties themselves, while containing references to human rights and provisions for the enforcement of obligations by Member States and Community institutions, do not provide broad standing for individual actions. Yet the ECJ has developed and gradually expanded doctrines of direct effect and state liability that allow individuals to rely on sufficiently precise Community legislation in national courts notwithstanding non-

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131. Technically, the case is not on appeal because the judgment of the Chamber is not final until the period for referring the case to the Grand Chamber has expired. ECHR, *supra* note 1, art. 44. A full right to appeal decisions was unacceptable to some states, while others insisted on the importance of a larger number of judges deciding important cases. The result in Protocol No. 11 represents a compromise between the two positions. For additional information on this compromise and its effects, see Rudolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT’L L. 145, 152–53 (1995).

132. Protocol No. 11, *supra* note 16, art. 43.

133. Note that the Grand Chamber cannot refer a case on its own motion. A chamber also may relinquish jurisdiction in favor of the Grand Chamber *prior to* judgment, but only if none of the parties to the case objects. These innovations place more control over the litigation in the hands of the parties. According to Judge Bernhardt, this is not necessarily positive, as the parties may be unaware of conflicts within the court regarding matters before it. “The experience of the present Court, acquired over some decades, indicates that relinquishment may be advisable before the chamber has taken a firm stand in cases where the matter is complex or the opinions of the chamber’s members diverge.” He adds that the new system “will seriously endanger the coherence of the case law of the future Court.” Bernhardt, *supra* note 131, at 152–53. It is likely, however, that most losing parties will feel that the issue is one of importance and should be referred to the Grand Chamber. The other party cannot block a request for referral. If the chamber has failed to follow prior case law in making its decision, the requesting party should find five judges of the Grand Chamber willing to review the case.

incorporation or implementation of the Community law.<sup>134</sup> Most cases will come on referral from national courts.

#### A. General Rules of Interpretation and the Specificity of Human Rights Treaties

The Vienna Convention on the Law of Treaties is the primary source in international law for interpreting a treaty. Although the Vienna Convention was not in force when the ECHR was concluded, the European Court of Human Rights, in *Golder v. U.K.*, established that the terms of the Vienna Convention concerning interpretation are applicable to the ECHR because they enunciate “generally accepted principles of international law.”<sup>135</sup> The Vienna Convention adopts a modified textual approach, requiring that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms,” in its context and in light of its object and purpose.<sup>136</sup> The “context” includes the preamble and annexes, any agreement between all of the parties, and any instrument made by one or more of the parties, in connection with the conclusion of the treaty.<sup>137</sup> Subsequent agreements and practice must be taken into account, as well as any rule of international law relevant to the relations among the States Parties. Only when application of these primary rules of interpretation leaves the meaning of a treaty ambiguous or obscure or leads to a manifestly absurd or unreasonable result, may recourse be had to supplementary means of interpretation, including the preparatory work of the treaty.

A teleological emphasis on the object and purpose of a treaty allows a dynamic or evolving interpretation that can move a treaty away from the original intent of its drafters. The ECHR and other human rights instruments are usually drafted with considerable generality, however, making it difficult to determine original intent. Judicial bodies thus exercise their authority by weighing the conflicting

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134. See, e.g., Case 152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Auth.*, *supra* note 88 (Teaching), [1986] E.C.R. 723 (1986).

135. *Golder v. United Kingdom*, 1 Eur. H.R. Rep. 524, para. 29 (1975); see also *Luedicke, Belkacem and Koç v. Germany*, 2 Eur. H.R. Rep. 149, para. 46. (1978).

136. Vienna Convention on the Law of Treaties, May 23, 1969, (entered into force Jan. 27, 1980), U.N. Doc. A/CONF.39/27, art. 31(1), *reprinted in* 8 I.L.M. 679 (1969).

137. *Id.* art. 13(2).

interests of the parties in the context of contemporary regional or global concerns.<sup>138</sup>

The European Court of Human Rights describes the ECHR as a “living instrument which must be interpreted in the light of present day conditions” rather than remain static.<sup>139</sup> It also holds that the object and purpose of the ECHR, which is to emphasize the protection of human rights, requires that limitations or qualifications of the rights granted be narrowly construed.<sup>140</sup>

The Court clearly struggles with questions of uniformity and diversity in judging whether a given state practice falls below ECHR standards. The Court has stated that it will search for “common European standards” based upon domestic law and practice, other international or European instruments and the Court’s own case law.<sup>141</sup> The Court has engaged in such searches to determine the legality of corporal punishment of juveniles,<sup>142</sup> the distinctions between legitimate and illegitimate children,<sup>143</sup> criminalization of homosexual conduct,<sup>144</sup> and the regulation of blasphemy.<sup>145</sup> The Court will often defer to the state when it finds no general consensus on an issue,<sup>146</sup> but it has also served notice that state law and practice cannot remain static while European standards evolve towards greater human rights protection. Thus, in the *Selmouni* case<sup>147</sup> the Court announced that

certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified dif-

138. Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT’L & COMP. L.Q. 58, 59 (1968).

139. *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, para. 31 (1978); *Loizidou v. Turkey* (Preliminary Objections), 20 Eur. H.R. Rep. 99, para. 71 (1995).

140. *Klass v. Germany*, 2 Eur. H.R. Rep. 214, para. 42 (1979–80); *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, para. 65 (1979); *Wemhoff v. Germany*, 1 Eur. H.R. Rep. 55, para. 8 (1968).

141. For an explanation of the principles and concepts informing this search and said bases, see P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 74–80 (3rd ed. 1998).

142. *Tyrer*, *supra* note 139, para. 45.

143. *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330, para. 41 (1979).

144. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, para. 60 (1981).

145. *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1, para. 57 (1996).

146. See, e.g., the issue of transsexuals, where the Court has found no “common European approach to the problems created by the recognition in law of post-operative gender status.” *Sheffield and Horsham v. United Kingdom*, 27 Eur. H.R. Rep. 163, para. 1(e) (1998). Where the Court itself is divided, it may take this as evidence of a lack of European consensus, although it has never discussed its methodology in determining whether or not a consensus exists.

147. *Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999–2000).



ferently in future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.<sup>148</sup>

While it may appear from *Selmouni* that states are judged by ever-changing standards, the Court in fact gives great weight to its precedents. Although neither the Convention nor the Rules of Court expresses the principle of *stare decisis*, the Rules make abandonment of precedent one of the grounds for a Chamber to relinquish jurisdiction in favor of a Grand Chamber.<sup>149</sup> The Court's stated approach is to follow its precedents "in the interests of legal certainty and the orderly development of the Convention case law."<sup>150</sup> It will depart from an earlier decision if it finds the earlier interpretation erroneous or for another "cogent reason" including the need to "ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions."<sup>151</sup>

The European Court of Human Rights has made clear that the principle of effectiveness is a fundamental principle of interpretation. It requires that the provisions of the Convention be interpreted "so as to make its safeguards practical and effective,"<sup>152</sup> protecting the individual in a real and practical way as regards those areas with which it deals.<sup>153</sup> The principle of effectiveness has led the Court to expand protections in a number of areas. For example, in *Soering v. United Kingdom*<sup>154</sup> and other cases concerning extradition or deportation, the Court has admitted petitions when violations were imminently threatened, but had not yet occurred.<sup>155</sup>

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148. *Id.* para. 101. In a subsequent decision in *Bilgin v. Turkey* (Nov. 16, 2000), available at <http://hudoc.echr.coe.int/hudoc/> (last visited Nov. 9, 2002), the Court found that destruction of property could amount to inhuman treatment in violation of article 3 of the Convention.

149. The Grand Chamber is the highest body under the Convention. It consists of 17 judges and three substitutes. It includes the President, Vice-Presidents of the Court and Presidents of the Chambers. See Rules of Court, Eur. Ct. H.R., ch. V, R. 24, (in force Nov. 1, 1998), available at <http://www.echr.coe.int/Eng/Edocs/RulesofCourt2002.htm#twentyfour> (last visited Oct. 30, 2002).

150. *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622, para. 35 (1990).

151. *Id.*

152. *Loizidou v. Turkey* (Preliminary Objections), 20 Eur. H.R. Rep. 99, para. 72 (1995); *Artico v. Italy*, 3 Eur. H.R. Rep. 1, para. 33 (1980).

153. *Airey v. Ireland*, 2 Eur. H.R. Rep. 305, para. 26 (1979).

154. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 349 (1989).

155. The decisions are particularly significant in light of the Convention limitation of standing to "victims" of violations. ECHR, *supra* note 1, art. 34.

The Court has been careful to note, however, that dynamic interpretation cannot extend the catalogue of protected rights nor expand the territorial scope of state obligations. In respect to the latter issue, a state's obligations may extend beyond the national territory in limited circumstances, to areas over which the state exercises effective control, whether acquired lawfully or not.<sup>156</sup> But the Grand Chamber of the Court unanimously held that such control requires "the exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control."<sup>157</sup> According to the Court, NATO aerial bombing during the conflict in the former Yugoslavia was not such a situation because the acts were performed or had effects outside the territory of the respondent states, not in areas where the states had *de facto* or *de jure* control. The result could be different for cases arising in territories like Kosovo, where control is exercised by a foreign military presence.

Another noteworthy point in *Bankovic*, as in *Al-Adsani v. United Kingdom*,<sup>158</sup> concerns the relationship between the ECHR and other areas of international law. In *Bankovic*, the Court indicated that it must take account of relevant rules of international law when examining questions concerning its jurisdiction and must interpret the Convention, insofar as possible, in harmony with other principles of international law of which it forms a part. The Court unanimously found that jurisdiction in international law is primarily territorial, indeed, that other bases of jurisdiction must be considered "exceptional." This is a very narrow view of jurisdiction that does not appear consistent with most international law doctrine,<sup>159</sup> but it is understandable that the Court would seek to limit its jurisdiction to exclude the extra-territorial military operations of its contracting states. In *Al-Adsani* the Court subordinated human rights jurisdiction to rules of sovereign immunity despite the claim—accepted by the Court—that torture constitutes a violation of a peremptory norm

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156. *Loizidou v. Turkey*, *supra* note 152, para. 52.

157. *Bankovic*, Admissibility (*Bankovic et al. v. Belg. at al*), *Stojanovic, Stoimenovski, Joksimovic & Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (Admissibility), Eur. Ct. H.R. (2001), *available at* <http://hudoc.echr.coe.int/hudoc/> (last visited Nov. 9, 2002).

158. *Al-Adsani v. United Kingdom*, 34 Eur. H.R. Rep. 11 (2002).

159. *See generally* D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 264–367 (5th ed. 1998) (discussing various bases for the exercise of jurisdiction).

from which there is no derogation.<sup>160</sup> These two judgments indicate that the Court has been careful to see human rights as a branch of international law, not as the trunk or roots from which all else grows.<sup>161</sup>

The European Court of Human Rights also references human rights treaties and attempts to make its judgments compatible with the texts of other human rights bodies. In *Jersild v. Denmark*,<sup>162</sup> the European Court looked to the International Covenant on Civil and Political Rights to ensure that its judgment would not bring Denmark into conflict with its United Nations obligations to combat hate speech. Similarly, in *Selmouni v. France*<sup>163</sup> the Court adopted the definition of torture contained in the United Nations Convention against Torture, while in *Peers v. Greece*,<sup>164</sup> the Court made use of the findings of the European Committee against Torture about prison conditions in Greece. This “cross-referencing” not only enhances the weight of the decision by invoking multiple precedents, but helps produce greater conformity of jurisprudence among the different human rights bodies.

## B. Margin of Appreciation

The concept of a margin of appreciation is extremely important to the work of the European Court of Human Rights.<sup>165</sup> It determines the scope of judicial review of state action and the degree of deference afforded to states in deciding on the implementation and application of rights guaranteed in the European Convention. To a large extent, it reflects and encapsulates the principle of subsidiarity that is much more prevalent in and associated with the EU and ECJ.<sup>166</sup> The

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160. Al-Adsani, *supra* note 158, paras. 57, 61.

161. See Dinah Shelton, *The Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 SASKATCHEWAN LAW REVIEW 301, 304–06 (2002) (describing assertions by human rights bodies of the supremacy of human rights law over other domains of international law).

162. *Jersild v. Denmark*, 19 Eur. H.R. Rep. 1 (1994).

163. *Selmouni*, *supra* note 147, para. 97.

164. *Peers v. Greece*, 33 Eur. H.R. Rep. 51, para. 61 (2001).

165. See, e.g., R. St. J. Macdonald, *The Margin of Appreciation*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (R. St. J. Macdonald et al. eds., 1983); Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the Court*, 4 HUM. RTS. Q. 474 (1982); Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the Court: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57 (1990); HOWARD CHARLES YOROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

166. Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in MACDONALD ET AL., *supra* note 165, at 41.

margin of appreciation acts both as a standard of review and as a substantive norm for interpreting the Convention. While Article 1 of the European Convention makes the obligation of States Parties clear to secure the rights and freedoms defined in the Convention to everyone, Article 19 provides that the Court shall ensure that this obligation is observed.

The doctrine of margin of appreciation was articulated in the first case to come before the Court, *Lawless v. Ireland*,<sup>167</sup> in connection with the scope of judicial review of a declared state of emergency in Ireland. It was discussed in more detail in the *Handyside* case,<sup>168</sup> in reviewing a ban on publication in order to protect the morals of minors. In the latter judgment, the Court refers to its role as subsidiary to the national system safeguarding human rights because the Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines. In particular, in assessing restrictions and limitations on rights, the Court gives deference to the state, because according to the Court, “by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the . . . ‘necessity’ of a ‘restriction’ or ‘penalty’ . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”<sup>169</sup> Consequently, a margin of appreciation is given to the domestic legislator and to the local courts or other bodies called upon to interpret and apply the law adopted.

The margin of appreciation is not unlimited, however. The Court, being responsible for ensuring the observance of state obligations, is empowered to give the final ruling on whether a restriction is compatible with rights guaranteed by the Convention. “The domestic margin of appreciation thus goes hand in hand with European supervision. Such supervision concerns both the aim of the measure challenged and its ‘necessity;’ it covers not only the basic legislation but also the decision applying it, even one given by an independent court.”<sup>170</sup>

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167. *Lawless v. Ireland* (No. 3), 1 Eur. H.R. Rep. 15 (1961).

168. *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737 (1976).

169. *Id.* para. 48.

170. *Id.* para. 49.

The doctrine has been applied to varying degrees in cases involving the right to liberty (Article 5),<sup>171</sup> the right to a fair trial (Article 6),<sup>172</sup> the right to respect for family and private life (Article 8),<sup>173</sup> freedom of expression (Article 10),<sup>174</sup> the prohibition on discrimination in respect to rights contained in the Convention (Article 14),<sup>175</sup> and the right to property (Protocol 1, Art. 1),<sup>176</sup> as well as the permissibility of derogations from certain Convention rights (Article 15).<sup>177</sup> In particular, the Court has used the doctrine in addressing those rights in the Convention that are circumscribed by limitations clauses, allowing the states to take proportional legal measures for prescribed legitimate ends.<sup>178</sup>

The Court has often applied such clauses deferentially while proclaiming that limitations must be narrowly construed and placing the burden of proof on the state to justify limiting measures. In this way, individual rights are adjudicated in reference to and balanced against the general interest. The breadth or narrowness of the margin varies from one case to another, depending in part on the Court's view of its own competence to substitute its judgment for that of the state's authorities. The Court thus scrutinizes asserted justifications for discrimination more carefully<sup>179</sup> while deferring considerably to a state's determination that specific measures are required by a national emergency<sup>180</sup> or that expression should be limited for reasons of morality.<sup>181</sup>

The freedom of expression cases decided by the European Court suggest a complex evaluation of the need for some uniform standards, particularly in reference to political speech, balanced with deference to local authorities on issues of artistic and commercial expression. In

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171. *Le Comte v. Belgium*, 4 Eur. H.R. Rep. 1 (1981).

172. *Golder v. United Kingdom*, *supra* note 135.

173. *Eriksson v. Sweden*, 12 Eur. H.R. Rep. 183 (1989); *Leander v. Sweden*, 9 Eur. H.R. Rep. 433 (1987); *Johnston v. Ireland*, 9 Eur. H.R. Rep. 203 (1986); *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56 (1986).

174. *Müller v. Switzerland*, 13 Eur. H.R. Rep. 212 (1988); *Lingens v. Austria*, 8 Eur. H.R. Rep. 103 (1986); *Sunday Times*, *supra* note 140; *Marckx*, *supra* note 143.

175. *Engel and Others v. Netherlands*, 1 Eur. H.R. Rep. 706 (1976).

176. *Sporrong and Lönnroth v. Sweden*, 5 Eur. H.R. Rep. 35 (1982); *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 329 (1986).

177. *Lawless v. Ireland*, *supra* note 167.

178. *See supra* note 174.

179. *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 7 Eur. H.R. Rep. 471 (1985).

180. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. 64–65 (ser. A) (1978).

181. *Müller v. Switzerland*, *supra* note 174.

*Jersild v. Denmark*<sup>182</sup> for example, an inflammatory interview with local Ku Klux Klan members, who expressed their racist opinions and negative views of minorities, was deemed to have sufficient public merit to outweigh the insult to victims of the hate speech thus broadcast. While the Court recognized the “vital importance of combating racial discrimination in all its forms and manifestations,”<sup>183</sup> it also recognized the role of the press, which it called particularly important in a democratic society in which one of the essential foundations is freedom of expression. The Court said it is “incumbent” on the press to impart information and ideas of public interest, “otherwise the press would be unable to play its vital role of public watchdog.”<sup>184</sup> This also means that the choice of media and reporting techniques is neither for the national nor the regional court, but for the journalists: “[A]rticle 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.”<sup>185</sup> In particular, the Court endorsed the use of interviews, calling news reporting based on interviews

one of the most important means whereby the press is able to play its vital role . . . . The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.<sup>186</sup>

Thus, in the eyes of the Court, the racist remarks in question were not enough to justify censorship.

While *Jersild* gave broad protection to journalists and political speech, cases concerning commercial and artistic speech have nearly always deferred to local sensibilities. In *Handyside v. U.K.*,<sup>187</sup> the Court accepted the British government’s censorship of a book which the government deemed obscene, anti-authoritarian, and destructive of the morals of adolescents. The Court, pointing out its subsidiarity to national legal systems, found no uniform European conception of morals, but rather variations according to time and place. As such, “[b]y reason of their direct and continuous contact with the vital

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182. *Jersild*, *supra* note 162.

183. *Id.* para. 30.

184. *Id.* para. 31 (citing *Observer & Guardian v. United Kingdom*, 14 Eur. H.R. Rep. 153 (1992)).

185. *Id.* (citing *Oberschlick v. Austria*, 19 Eur. H.R. Rep. 389 (1991)).

186. *Id.* para. 35.

187. *Handyside*, *supra* note 168.

forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”<sup>188</sup> While the Court ultimately judges the necessity and proportionality of the measures, the state authorities retain a margin of appreciation.

The Court’s application of its margin of appreciation doctrine in this way has produced results that are inconsistent with its stated view that information and ideas must be tolerated, even if they offend, shock or disturb the state or any sector of the population, because such are the demands of a democratic society. The Court has upheld bans on the exhibition of paintings deemed obscene by local Swiss authorities<sup>189</sup> and the showing of a film found offensive by the majority-Catholic population of the Tyrol area of Austria.<sup>190</sup> In *Otto-Preminger Institut v. Austria*, the Court expressly agreed that the government could legitimately restrict speech to protect the majority’s religious feelings and to prevent disorder when those offended threatened to disrupt the cinema. The speech of the minority may thus be held hostage to the threats of the majority. The Court suggested that expressions about religion “gratuitously offensive” to adherents of that religion constitute an infringement of their rights and “do not contribute to any form of public debate capable of furthering progress in human affairs.”<sup>191</sup> The Court considers it may be necessary in a democratic society to “sanction or even prevent improper attacks on objects of religious veneration.”<sup>192</sup> States have a margin of appreciation to determine the necessity of such interference with speech. Thus, the Austrian authorities were found to have acted “to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.”<sup>193</sup> In *Otto-Preminger* the Court gave little or no weight to the facts that the movie was shown in a small art house attended largely by subscribers, advertising was designed to discourage those who might be offended from viewing the film and

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188. *Id.* para. 48.

189. *Müller v. Switzerland*, *supra* note 174.

190. *Otto-Preminger –Inst. v. Austria*, 19 Eur. H.R. Rep. 34 (1994).

191. *Id.* para. 49.

192. *Id.*

193. *Id.* para. 56.

that seeing the film required paid admission from those who chose to attend.

The Court's use of inter-state comparisons to give content and scope to Convention norms is sometimes in tension with the margin of appreciation. The Court often finds an emerging or established consensus on evolved standards that it may apply to all states, not just those that have moved in that direction.<sup>194</sup> In other cases, where the Court finds wide divergence in practice, it is likely to rely upon the margin of appreciation to permit divergent political determinations,<sup>195</sup> while calling on states to interpret and apply the Convention "in the light of current circumstances," having regard particularly to scientific and societal developments.<sup>196</sup>

There are several problems with the Court's approach. First, it risks moving to the lowest common denominator, halting the teleological approach that emphasizes the objective of protecting human rights. Second, from the perspective of the holdout states it is unclear why a majority view should apply and override the margin of appreciation. Third, the approach itself seems to undermine the notion of universality that is a foundation of human rights theory. Finally, and perhaps most importantly, the Court does not specify its comparative methods, standards of evidence or the scope of its inquiry. Commentators cite the lack of depth, rigor and transparency in the Court's comparative law approach to the margin of appreciation doctrine.<sup>197</sup>

In fact, the reference to national law usually appears simply as a justification for the Court's decision to give autonomous meaning to the scope of a right or to decline to impose a common approach to a new claim. This approach can be understood within the framework of the Court's view of its role as subsidiary to the national legal systems, but questions remain as to why a dissenting state should be held to the majority's views or, alternatively, why a lack of consensus should

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194. See *Marckx v. Belgium*, *supra* note 143, para. 31 (concluding that evolution in European law no longer permits distinctions between illegitimate and legitimate children compatible with article 8 of the Convention).

195. See generally *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986); and *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990) (lack of consensus on issue of transsexuality means article 8 does not require changing of personal status to comport with new identity).

196. *Rees*, *supra* note 195, at 19; *Cossey*, *supra* note 195, at 17.

197. See Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1224, 1225 n.31 (1998); P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 603-09 (2d ed. 1995).



permit states to escape a normative development justified on other bases. Given the expansion of the Council of Europe eastward where states lack a firm political tradition of protection of human rights, the Court's approach could lead to a weakening of the human rights protections originally afforded under the Convention.

The challenge the Court faces is to develop a set of normative principles that do not demand the express consent of the Member States, while retaining enough political will to ensure compliance with the Court's decisions. Judge MacDonald acknowledged this dilemma, noting that "[a]s a supranational institution, the Court faces a genuine difficulty over its proper role. The whole enterprise of rights protection on this scale requires a delicate balance between national sovereignty and international obligation."<sup>198</sup> Grounding decisions in national law can be a means to retain and strengthen the Court's political legitimacy and protect it against charges of unduly overriding state sovereignty. Perhaps for this reason, the Court is most deferential when states claim the existence of national emergencies that may affect the life of the nation.<sup>199</sup> The Court affords the state a measure of discretion in assessing the need for specific action to respond to the emergency. The Court must not forget, however, that it is usually during national emergencies that rights are most severely limited, or even extinguished.

European Union institutions rarely use the phrase margin of appreciation but frequently refer to the fundamental principle of subsidiarity that governs the relationship between EU institutions and Member States. The principle of subsidiarity is contained in Article 3b of the EC Treaty. It provides that the exercise of Community power is appropriate only where the objectives of the intended action cannot be sufficiently achieved by the Member States and can therefore best be achieved by Community action. It also means that an action cannot go further than is necessary to attain Community objectives and must be within the ambit of the EC treaty. The extent to which the doctrine of subsidiarity requires the ECJ to defer to national judicial determinations remains an unsettled issue.<sup>200</sup>

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198. R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 124 (R. St. J. Macdonald et al. eds., 1993).

199. *Greece v. United Kingdom*, 1958-59 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm'n on H.R.).

200. See generally Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1 (2000).

Like the European Court of Human Rights, the ECJ has faced the issue of determining the proper balance between protecting individual rights and respecting state limitations purported to be in the public interest. Under Articles 46 and 55 of the EC Treaty, Member States may enact regulations that restrict freedoms on the grounds of public policy, public security or public health. The freedom or fundamental right to provide services, for example, can be limited by rules which are necessitated by overriding reasons related to the public interest. Freedom of movement can be limited, even by discriminatory provisions, if they are proportionate to the intended objective,<sup>201</sup> which also must be in the public interest.<sup>202</sup> The ECJ defers somewhat to Member State “political and economic choices” connected with “national or socio-cultural characteristics which are, in the present state of Community law, a matter for the Member States.”<sup>203</sup> In many respects, the approach of the ECJ is similar to that of the ECHR, without use of the term margin of appreciation.

### C. Implied Rights

The European Court of Human Rights and the ECJ have looked beyond the explicit language of their respective treaties to find rights implied in the express guarantees. The ECJ has implied certain human rights in order to ensure the successful attainment of the Community’s economic objectives, especially the free movement of workers, goods and services.<sup>204</sup> Other rights have emerged from the ECJ’s doctrine of fundamental rights as a general principle of law, including the right to property,<sup>205</sup> the right to remedies for gender discrimination,<sup>206</sup> and the right to privacy.<sup>207</sup>

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201. See Case 352/85, *Bond van Adverteerders v. Netherlands*, [1988] E.C.R. 2085, 2135, 3 C.M.L.R. 113 (1988). Proportionality analysis in the ECJ is very similar to that of the ECHR. The measure in question must serve a legitimate end; there must be no equally effective, less burdensome measure available and the negative impact on the freedom must not be excessive compared to the gain. *Id.*

202. See Case C-260/89, *Elliniki Radiophonia Tileorassi v. Dimotiki Etairia Pliroforissis*, [1991] E.C.R. I-2925, I-2960 (1991).

203. See Case 159/90, *Soc. for the Prot. of Unborn Children Ireland, Ltd. v. Grogan*, [1991] E.C.R. I-4685, I-4717, 3 C.M.L.R. 849 (1991) [hereinafter SPUC].

204. While Article 60 of the EC treaty expressly mentions the right to move freely within the Community to provide services, the Court has had to imply a right to travel to receive services. See Joined Cases 286/82 and 26/83, *Luisi v. Ministero del Tesoro*, [1984] E.C.R. 377.

205. See Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1979] E.C.R. 3727, 3745.

206. See Case 149/77, *Defrenne v. Soc. Anon. Belge de Nav’n Aérienne Sabena*, [1978] E.C.R. 1365, 1378.

The ECHR has implied rights as part of its “doctrine of effectiveness.” In the *Golder* case,<sup>208</sup> the applicant was denied permission to see a lawyer in order to bring an action against a prison warden. The European Court of Human Rights found that the government violated Article 6, the right to a fair trial, because that right must be held to imply a right of access to a court where a fair trial could be obtained. The ECHR found this interpretation based on “the very terms of the first sentence of Article 6(1), read in its context and having regard to the object and purpose of the convention, a law-making treaty . . . and to general principles of law.”<sup>209</sup> Similarly, the ECHR held in *Airey v. Ireland*,<sup>210</sup> that where no legal aid was available and the costs of litigation were prohibitive, the government violated the right of access to a court as part of the right of a fair trial. In *Luedicke, Belkacem and Koç*,<sup>211</sup> the ECHR found an obligation to provide free interpretation for foreign-language defendants in criminal cases implied in the right to a fair trial.

The European Court of Human Rights also implied positive obligations with respect to certain rights, including the right to life<sup>212</sup> and the right to family life.<sup>213</sup> The right to freedom of assembly may also require positive measures to ensure that others do not interfere with the exercise of the right to freedom of assembly.<sup>214</sup> The European Court of Human Rights has accepted that pollution and other environmental harm can lead to violations of rights guaranteed by the Convention, particularly Article 8 which provides for respect for home and private life.<sup>215</sup>

#### D. Fact-finding, Evidence and Burden of Proof

In the former system, the Commission had primary authority to determine the facts of cases brought before it. The Commission undertook its examination of the application “with a view to ascertain-

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207. See Joined Cases 46/87 and 227/88, *Hoechst A.G. v. Comm’n*, [1989] E.C.R. 2859, 2924.

208. *Golder*, *supra* note 135.

209. *Id.* para. 40.

210. *Airey*, *supra* note 153.

211. *Luedicke*, *supra* note 135.

212. *McCann v. United Kingdom*, Eur. Ct. H.R., No. 324 (ser. A) (1995).

213. *Marckx v. Belgium*, *supra* note 143, para. 49; *Gaskin v. United Kingdom*, 12 Eur. H.R. Rep 36, para. 49 (1989).

214. *Plattform Arrtztte fur das Legen v. Austria*, 13 Eur. H.R. Rep. 204, para. 32 (1988).

215. *Lopez Ostra v. Spain*, 20 Eur. H.R. Rep. 277 (1994); *Maria Guerra v. Italy*, 26 Eur. H.R. Rep. 357 (1998).

ing the facts.” Determination of whether or not the facts found disclosed a violation of the Convention was a matter for the Committee of Ministers, unless the respondent state or the Commission referred the case to the European Court of Human Rights. In practice, hearings were held with representatives of the parties. The Commission also had authority to undertake an investigation, for which the state or states involved were to “furnish all necessary facilities, after an exchange of views with the Commission.” The exchange of views was only as to time, place, and manner of the investigation, not as to the Commission’s determination that an investigation was needed. That question lay totally within the Commission’s discretion. Today, the ECHR increasingly must evaluate evidence as cases, particularly against Turkey, arrive on disputed facts. The European Court of Human Rights may conduct hearings on site or seek documentary evidence. In most cases, the Court has stated that the applicant must prove allegations beyond a reasonable doubt.<sup>216</sup> This standard is proving insurmountable in cases where the government allegedly engages in forms of mistreatment that leave few physical signs. While the Court shifts the burden to the government to explain custodial injuries where clear medical evidence is present, this does not help in cases where more subtle, if equally serious, forms of mistreatment occur. Thus, in *Sevtap Veznedaroglu v. Turkey*,<sup>217</sup> where the applicant asserted that she had been held in detention without charges, and subjected to death threats, electric shocks, and hanging by the arms, and deprived of food, the lack of forensic evidence precluded a finding in her favor. A compelling dissent in the case argues that the standard of proof beyond a reasonable doubt is legally untenable in torture cases and, in practice, unachievable:

Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim’s complaint is almost invariably confronted with the negation ‘corroborated’ by many.<sup>218</sup>

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216. See, e.g., Ireland v. United Kingdom, *supra* note 180, para. 161.

217. *Sevtap Veznedaroglu v. Turkey*, Eur. Ct. H.R. (2000), available at <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Nov. 9, 2002).

218. *Id.* para. 14.

As the dissent notes, the forced nudity, suspension, death and rape threats, and deprivation of food are “amusements particularly ungenerous with those tangible signs dear to forensic experts.” According to the dissent, the only reasonable test ought to have been: “on a balance of credibility, which of the two parties rests more convincingly on the side of truth?”<sup>219</sup>

The ECJ requires both the applicant and the defendant to adduce the evidence upon which they rely to prove an assertion of fact.<sup>220</sup> In addition, the ECJ has the power to call for the production of evidence. The risk of non-persuasion rests with the applicant, however, unless the evidence is in the hands of a party who fails to produce it.<sup>221</sup> Unlike the ECHR, the ECJ has not insisted on a specific standard of proof. The ECJ has referred to “full proof”;<sup>222</sup> to “sufficiently weighty, clear and uncontradictory circumstantial evidence that is not contradicted by contrary circumstantial evidence”;<sup>223</sup> and to a “reasonable degree of certainty.”<sup>224</sup>

The jurisprudence of the two courts and that of other human rights tribunals<sup>225</sup> suggests their understanding that human rights litigation differs somewhat from a typical inter-state dispute brought to

219. *Id.* para. 16.

220. *See, e.g.*, Joined Cases 117/76 and 16/77, *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen*, [1977] E.C.R. 1753, 1784, Common Mkt. Rep. (CCH) ¶ 8457, at 8246. In Case 18/70, *Duraffour v. Council*, [1971] E.C.R. 515, the court held that the applicant had the burden of proof that her husband had not committed suicide, in order to justice a widow's insurance claim; however, the defendant also was bound, “as the appointing authority, to cooperate . . . in order to discover the truth.” *Id.* at 525, ¶ 31.

221. *See, e.g.*, Case 45/64, *Comm'n v. Italy*, [1965] E.C.R. 857, 867, Common Mkt. Rep. (CCH) ¶ 8038, at 7542 (ECJ shifted burden onto defendant government after commission challenged certain Italian taxing procedures as violation of article 96 of EEC Treaty). The government asserted that the burden was on the commission to prove that the tax refunds it was making were greater than those authorized by the Treaty. *Id.* at 874, Common Mkt. Rep. (CCH) ¶ 8038, at 7548 (opinion of Advocate-General Gand). The information necessary to decide this issue was in the possession of the Italian government, however. *Id.* The court held that the government must provide the evidence to prove compliance. *See also* Case 19/77, *Miller v. Commission*, [1978] E.C.R. 131, 152–53, ¶¶ 20–22, Common Mkt. Rep. (CCH) ¶ 8439, at 7926 (dismissing application where applicant failed to produce accounts to support its claim that fine imposed by commission was unduly burdensome).

222. Case 6/54, *Netherlands v. High Auth.*, [1954–56] E.C.R. 103, 115. Case 6/54, *Netherlands High Authority*, [1954–56] E.C.R. 103, 115.

223. Case 18/70, *Duraffour v. Council*, [1971] E.C.R. 515, 525, ¶ 30.

224. Case 8/65, *Acciaierie e Ferriere Pugliesi v. High Auth.*, [1966] E.C.R. 1, 12.

225. *See generally* Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 *FORDHAM INT'L L. J.* 361 (1989) (describing the proceedings and evidence rules before international human rights tribunals).

an international tribunal, where the parties are not only juridically equal, but are often similarly situated to obtain and produce evidence “to enable the tribunal to discover the truth concerning the conflicting claims of the parties before it.”<sup>226</sup> In human rights litigation, the primary purpose is to ensure that states comply with their obligations to respect and ensure the internationally guaranteed rights. The defendant state has exclusive control over the territory where the evidence is to be found and over the individuals bringing the claims. The parties are neither legally nor factually equal in their ability to produce evidence. In this circumstance, the courts draw upon the civil law model of inquiry or investigation and may shift the burden to the state to produce evidence when facts are disputed. They may also more readily apply a presumption of truth from a state’s silence or failure to cooperate.

#### E. Remedial Powers and Enforcement

Article 41 of the European Convention is cryptic and does not make clear whether the Court may order remedial measures when a violation is found. Throughout most of its history, the ECHR has interpreted its powers narrowly and declared that it is for the respondent state to decide upon the measures needed to fulfill the state’s obligations and comply with the judgment declaring the state’s law or action incompatible with the Convention. Judgments always involve a declaration judging whether or not a violation has been proven. Where a violation is found, Article 41 allows the ECHR to give “just satisfaction” to the injured party, including pecuniary and moral damages, as well as reimbursement of costs, expenses, and attorneys’ fees. The ECHR’s judgments on remedies have been inconsistent and are rarely accompanied by reasoned opinions.<sup>227</sup>

The judgments of the ECHR are legally binding on the respondent state. The Committee of Ministers, a political body, has the re-

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226. D. V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 1 (1975). In this context, it is important to distinguish between establishment of the facts and weighing the inferences and conclusions to be drawn from them. The latter is an inherent part of the judicial function. In situations where the parties agree on the facts, courts normally do not reopen factual issues. At least one court rejected being bound by concessions made by the parties, however, viewing the nature of the proceedings before it as neither wholly accusatorial nor entirely inquisitorial. See Andre, *Evidence Before the European Court of Justice, with Special Reference to the Grundig/Consten Decision*, 5 COMMON MKT. L. REV. 35, 38 (1967–68).

227. For a critical evaluation of the Court’s approach, see DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 1, 47–60, 217–18, 272–78 (1999).

sponsibility to ensure compliance with the ECHR's decisions. Article 8 of the Statute of the Council of Europe empowers the Committee of Ministers to suspend or expel from membership any State that has seriously violated Article 3 of the Statute. Systematic human rights violations or non-compliance with judgments of the Court would likely be seen as such a breach.<sup>228</sup>

The ECJ indicated its approach to remedies for breach of Community law in *Brasserie du Pecheur v. Germany*.<sup>229</sup> The ECJ applied the principle that the state is liable for damage caused in accordance with its national law, stating that:

Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favorable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.<sup>230</sup>

Applying this test, the ECJ found that the limitations of German national law were incompatible with Community law.<sup>231</sup> In other cases, the ECJ also has exercised supervisory power over the remedies provided by Member States, using the principle of subsidiarity in favor of its jurisdiction. In several cases, for example, the Court has held that the prohibition of discrimination must be enforced by sanctions that have a real deterring effect.<sup>232</sup>

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228. See, e.g., LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1959-90 (1973) (discussing Greece's withdrawal on the eve of its expulsion from the Council in the 1970s).

229. Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur SA v. Germany*, [1996] E.C.R. I-1029.

230. *Id.* paras. 82-83.

231. Germany had been found in violation of EC law. Those injured by the violation then sought reparations. The German court referred the question of whether national law or Community law governed the conditions under which reparations would be afforded to the ECJ. The German law made government liability for reparations dependant "on a legislative act or omission being referable to an individual situation." *Id.* para. 71. The ECJ, however, said that this would make effective reparation for loss or damage from breach of Community law impossible or extremely difficult in practice, and hence it could not apply to legislative breaches of EC law. *Id.* para. 72.

232. See, e.g., Case C-177/88, *Dekker*, [1990] E.C.R. I-3941 and Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Auth.*, [1993] E.C.R. I-4400, 3 C.M.L.R. 293 (1993). For a discussion of ECJ cases on remedies, see SHELTON, *supra* note 225, at 161-66.

## F. Gross and Systematic Violations

The ECHR has been fortunate in having few cases of gross and systematic violations. Those cases that have been brought indicate the limitations of the judicial process in resolving systemic failure of the rule of law.<sup>233</sup> In this respect, the ECHR faces the same problem the United States Supreme Court did when it decided *Brown v. Board of Education*<sup>234</sup> in the face of long-standing and widespread *de jure* discrimination, legally founded and often supported by the majority of citizens. Without the full support of the executive, which required calling out the military to enforce the decision at one point,<sup>235</sup> the United States Supreme Court's judgment would have been toothless.

The ECHR has faced some cases involving widespread and serious abuse. The inter-state case brought by Denmark, Norway, and Sweden against Greece,<sup>236</sup> following a military coup d'état and suspension of the constitution in Greece in 1967, was the most difficult situation faced by the system in its first decades. A detailed investigation led the Commission to conclude that a purported Greek derogation from the Convention was invalid and that the Greek government had committed flagrant violations of human rights. On the eve of a vote to expel Greece from the Council of Europe, the Greek government announced its withdrawal, returning in 1974 after a restoration of democracy. Both in the short term and in the long run, the case had the effect of strengthening the democratic opposition to the Greek government, documenting the abuses that were occurring, and legitimizing outside pressure on the military to return to democratic governance. Neither the existence of the Convention nor of the ECHR prevented the coup d'état or the large-scale human rights violations that resulted, however. Nor, for that matter, did the constitution and laws of Greece stand in the way of the military.

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233. For a suggestion that systemic failure also inheres in the European human rights mechanisms, see Oren Gross, "Once More into the Breach": *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998).

234. *Brown et al. v. Board of Education of Topeka Kansas et al.*, 347 U.S. 483 (1954).

235. Resistance to integration led to a showdown between white extremists and the federal government in 1957 when President Eisenhower was forced to send federal troops to Little Rock, Arkansas to disperse rioting white crowds preventing nine black students from entering Central High School. See 1957 Desegregation at Little Rock, Arkansas, at <http://www.eisenhowerbirthplace.org/legacy/ike0003.htm> (last visited Nov. 9, 2002).

236. *Denmark, Norway & Sweden v. Greece*, 12 Y.B. Eur. Comm'n H.R. 1 (1969).



In recent years, when there have been serious or widespread violations, some states have challenged the authority of the European Court of Human Rights' judgments with regard to either the just satisfaction awarded or specific measures required of them by the judgments.<sup>237</sup> The Committee of Ministers' position remains firm that states have an unconditional obligation to comply with judgments of the Court. Confidential scrutiny of a state during the Committee of Ministers' meetings can lead to direct contacts by the Chairman, public resolutions may be adopted to convey the Committee of Ministers' concerns, and other states, organizations, and parties can pressure the recalcitrant government. If there are serious obstacles to execution, the Committee of Ministers may adopt a more strongly worded interim resolution urging the authorities to take the necessary steps to comply. The Committee of Ministers has been urged by the Rome Ministerial Conference and by the Parliamentary Assembly to study what else may be done. The problem is extremely serious because non-compliance is a threat to the entire system. As time passes and compliance is not forthcoming, the credibility of the system is put in question.

### III. JURISDICTIONAL OVERLAP AND POTENTIAL CONFLICTS

Regional courts and other human rights bodies face questions not only about their roles and jurisdiction vertically (*vis a vis* Member States), but horizontally, in relation to the institutions that created

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237. Italian procedural delay cases have been a fixture in recent years at the European Court of Human Rights due to the failure of the Italian government to repair its judicial system. In 2001 alone, the Court rendered 357 judgments concerning the length of court proceedings in Italy. See Eur. Ct. H.R., Survey of Activities 2001, at 22 (Council of Europe 2002). The case of *Loizidou v. Turkey*, *supra* note 139, has gone without enforcement due to Turkish dissatisfaction with the decision. The Council of Ministers has adopted increasingly strong resolutions concerning the case, but without results thus far. See *Interim Resolution of the Comm. of Ministers*, Res. DH(2001)80 (2001) (adopted by the Comm. of Ministers on June 26, 2001 at the 757th meeting of the Ministers' Deputies) concerning the judgment of the European Court of Human Rights of July 28, 1998 in the case of *Loizidou* against Turkey. In this resolution, the Committee of Ministers recalled earlier resolutions, in which it declared "that the refusal of Turkey to execute the judgment of the Court demonstrated a manifest disregard for Turkey's international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe, and strongly insisted that, in view of the gravity of the matter, Turkey comply fully and without any further delay with this judgment." The Committee of Ministers declared its resolve "to ensure, with all means available to the organization, Turkey's compliance with its obligations under this judgment" and called upon the authorities of the Member States to take such action as they deem appropriate to this end.

them and *inter se*. In this respect, two concerns have been raised about the expanded human rights jurisdiction of the ECJ. The first stems from the Court's already rising caseload, and will be discussed *infra*. The second problem is the risk of potential conflicts between the jurisprudence of the ECHR and the ECJ. Several such cases have already arisen. First, in the area of privacy rights, the two courts have interpreted the scope of the right to privacy differently. The ECJ has interpreted it as not encompassing business activities or premises.<sup>238</sup> Two years later, the ECHR held that a warrantless search of professional activities and premises constitutes a violation of the right to privacy.<sup>239</sup> A similar conflict has arisen in the interpretation of the right against self-incrimination as found in ECHR Art. 6. The ECJ has held that the protection applies only to criminal investigations, not to administrative procedures such as tax reviews.<sup>240</sup> In a subsequent case, the ECHR reached a different result,<sup>241</sup> holding that any attempt to use pecuniary sanctions to force a person to produce self-incriminating documents is a breach of Article 6.

The two courts have also approached the issue of homosexuality differently, especially as concerns discriminatory measures.<sup>242</sup> Notably, all these cases were decided by the ECJ before the issue had arisen in the ECHR and thus were matters of first impression. Where there is clear jurisprudence of the ECHR, the ECJ has not diverged in its judgments. Nor have states been put to a choice between incompatible laws and inconsistent obligations. Conforming to a wider interpretation of the Convention, rights would not put the state in breach of any obligation; indeed Article 53 acts as a savings clause to ensure that any greater rights or broader interpretation of them will be given effect.<sup>243</sup> The problem of conflict is thus less real than it might appear.

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238. Case 142/88 Hoechs AG v. Bergrohr, [1991] 1 C.M.L.R. 383 (1991).

239. Niemietz v. Germany, 16 Eur. H.R. Rep. 97 (1993).

240. Case 374/87, Orkem SA v. Comm'n, 1984 E.C.R. 3283.

241. Funke v. France, 256-A Eur. Ct. H.R. (ser. A) (1993).

242. Compare Case C-249/96, Grant v. South-West Trains, [1998] 1 C.M.L.R. 993 (1998) with Smith & Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (1999) and Lustig-Prean & Beckett v. United Kingdom, 7 Butterworths Human Rights Cases 65 (1999). See also the different approaches of the two courts on the provision of information about abortion services. Case C-159/90, SPUC v. Grogan compared to Open Door Counseling & Dublin Well Women Centers v. Ireland, 246 Eur. Ct. H.R. (1992).

243. Article 53 provides, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under

Individuals do try to use both systems to enhance human rights protections. The ECJ has faced the problem of determining the extent of its jurisdiction over human rights issues relating to enforcement of judgments of the European Court of Human Rights. In 1997, the Austrian Supreme Court asked the ECJ for a preliminary ruling to determine the effect of a decision by the European Court of Human Rights on a Member State.<sup>244</sup> The ECJ held that it lacked jurisdiction to offer interpretive guidance because the matter was not fundamentally one of Community law.<sup>245</sup> Had the ECJ decided otherwise, its jurisdiction would have substantially overlapped with that of the European Court of Human Rights and the Committee of Ministers of the Council of Europe.

The applicant, Kremzow, was convicted in Austria of murder and unlawful possession of a firearm for which he received the maximum sentence of 20 years in an institution for the mentally ill.<sup>246</sup> Kremzow had initially confessed but promptly retracted his confession. He appealed his conviction whereupon his sentence was modified to life in an ordinary prison. He claimed that his rights were violated because he was not allowed to defend himself in person at the Austrian Supreme Court. The ECHR unanimously found that Austria had violated Article 6(1) when taken in conjunction with Article 6(3) and awarded Kremzow costs and expenses in just satisfaction. Kremzow then brought action in the civil court in Vienna asking for a reduction in his sentence and for damages. The court rejected his claim and the decision was upheld on appeal.<sup>247</sup> Although a judgment of the ECHR has constitutional status in Austria, the effect on a final criminal judgment is undecided in Austrian courts. Kremzow filed an “extraordinary appeal” with the Austrian Supreme Court, asking it to

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the laws of any High Contracting Party or under any other agreement to which it is a Party.” ECHR, *supra* note 1, art. 53.

244. Case C-299/95, *Kremzow v. Republic Österreich*, [1998] 3 C.M.L.R. 1289 (1998).

245. *Id.* at 2646.

246. The facts are discussed at length in the case before the ECHR, *Kremzow v. Austria*, 17 Eur. H.R. Rep. 322 (1993).

247. The damages claim was first rejected on February 9, 1994 by the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna). That judgment was then upheld by the Oberlandesgericht Wien (Higher Regional Court, Vienna) on July 25, 1994, on the ground that under Paragraph 2(3) of the Amtshaftungsgesetz (the Law on State Liability) no claim for compensation could arise out of a judgment of the Oberster Gerichtshof. Further, under an April 3, 1995 order, the Oberster Gerichtshof rejected Mr. Kremzow’s application for a reduction in sentence. *Id.* paras. 9–10.

request a preliminary ruling from the ECJ on the issue of whether the decision of the ECHR is binding on Austrian Courts.

The Austrian Supreme Court requested that the ECJ answer whether the provisions of the European Convention are part of Community law allowing the ECJ to give a preliminary ruling pursuant to Article 177 EC.<sup>248</sup> In the event of a positive response to this question, the Austrian Supreme Court had five further questions to ask.

The ECJ first reaffirmed that “fundamental rights form an integral part of the general principles of Community law.”<sup>249</sup> Second, it agreed that measures which are incompatible with observance of the human rights recognized and guaranteed by the Community are not acceptable.<sup>250</sup> Third, the ECJ held that when an issue arises in the application of Community law, the ECJ is obligated to assist the national court to act in conformity with Community law and the European Convention.<sup>251</sup> When, however, the issue falls outside the scope of Community law, the ECJ lacks jurisdiction to give a preliminary ruling or interpretative guidance.<sup>252</sup> In response to Kremzow’s argument that restraints on his freedom of movement raised an issue of Community law, the ECJ found that the “hypothetical possibility of restraint” had insufficient connection with Community law to justify the application of Community provisions.<sup>253</sup> In this respect, the ECJ noted that Kremzow was convicted of violating domestic law, not Community law. The questions presented thus all concerned Austrian national legislation, not Community law. Accordingly, enforcement of the ECHR judgment remains within domestic law and the institutions of the Council of Europe.

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248. Article 177 of the EEC Treaty states: The Court of Justice shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a member-state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member state, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

249. Kremzow, *supra* note 89, at 2645, ¶ 14.

250. *Id.* ¶ 14.

251. *Id.* ¶ 15.

252. *Id.* See also SPUC, *supra* note 203.

253. Kremzow, *supra* note 89, at 2645, ¶ 16.

#### IV. CONCLUSION: IMPACT OF THE COURTS AND ISSUES FOR THE FUTURE

In Europe, it is relatively easy to demonstrate the effect of the ECHR and the European Court of Human Rights judgments:<sup>254</sup> Austria, for example, has modified its Code of Criminal Procedure;<sup>255</sup> Belgium has amended its Penal Code, its laws on vagrancy, and its Civil Code;<sup>256</sup> Germany has modified its Code of Criminal Procedure regarding pre-trial detention, given legal recognition to transsexuals, and taken action to expedite criminal and civil proceedings;<sup>257</sup> The Netherlands has modified its Code of Military Justice and the law on detention of mental patients;<sup>258</sup> Ireland created a system of legal aid;<sup>259</sup> Sweden introduced rules on expropriation and legislation on building permits;<sup>260</sup> Switzerland amended its Military Penal Code and completely reviewed its judicial organization and criminal procedure applicable to the army;<sup>261</sup> and France has strengthened the protection for privacy of telephone communications.<sup>262</sup> The Court has undoubtedly shaped the legal standards of Europe, influencing domestic law and practice in criminal law, the administration of justice and family, immigration, media and property law.

There is one major difference, however, between the results obtained in the European Court and those of a domestic court. Most of the changes made to state law and practice following a judgment of the European Court are prospective and the individual applicant may not benefit from them. The European Court of Human Rights has no power to reopen domestic proceedings, annul a wrongful conviction, or ensure that the reforms instituted benefit the individual that

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254. See generally Holly Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311 (1996).

255. See Neumeister, 8 Eur. Ct. H.R. (ser. A) (1968); Stogmuller, 9 Eur. Ct. H.R. (ser. A) (1969); Matznetter, 10 Eur. Ct. H.R. (ser. A) (1969); Ringeisen, 13 Eur. Ct. H.R. (ser. A) (1971); and Bonisch, 92 Eur. Ct. H.R. (ser. A) (1985).

256. De Wilde, Ooms & Versyp (Vagrancy Cases), 12 Eur. Ct. H.R. (ser. A) (1970) and Marckx, *supra* note 143 (discrimination between legitimate and illegitimate children).

257. See, e.g., Luedicke, *supra* note 211 (interpreters fees); Belkacem & Koc, *supra* note 135 (interpreters fees).

258. Engel, *supra* note 175 (military penal code) and Winterwerp, 33 Eur. Ct. H.R. (ser. A) (1979) (mentally ill).

259. Airey, *supra* note 153, at 32.

260. Sporrang & Lonnroth, 88 Eur. Ct. H.R. (ser. A) (1985).

261. Eggs v. Switzerland, Comm. of Ministers, Application 7341/76, reported at 15 Dec. & Rep. 35 and 20 YB 448 (1980).

262. Guzzardi v. Italy, 39 Eur. Ct. H.R. (ser. A) (1980).

brought the case in the first place. It took Belgium nearly eight years to change its legislation on the status of illegitimate children after the judgment in the *Marckx* case, while Germany needed more than five years to comply with the judgment in the *Ozturk* case that free language interpretation must be provided for an accused.

The accomplishments of the Convention machinery must be understood in the context of the evolution and the pitfalls along the way. It is worth recalling that the first case considered by the European Court of Human Rights plunged it into one of the most politically sensitive and protracted conflicts in Europe.<sup>263</sup> It concerned the detention without trial in Ireland of a suspected member of the Irish Republican Army in the exercise of special powers conferred by the Offences Against the State Act of 1940. The Court found no violation in light of the Irish government's derogation, which the Court found was justified. The 1978 interstate case of *Ireland v. United Kingdom*<sup>264</sup> also arose out of the conflict in Northern Ireland and alleged ill treatment of detainees by the British government. In this instance, the Court found violations of the Convention. The fact that the Court has survived and flourished despite taking up politically sensitive cases, has adjudged more than 2,500 cases over more than 40 years, and has afforded remedies to individuals when none were available in domestic law, is a remarkable achievement. The question is whether the Court is to be destroyed by its own success.

Today, more than 800 million persons in 44 states have direct access to the European Court of Human Rights to complain of human rights violations. With the recent accession of Member States from Central and Eastern Europe, the aims of the system have shifted in part to take on consolidation of democracy and the rule of law in the wider Europe. The process is one of continuing and dynamic interaction between the international mechanism and the national legal systems, in which the European Court of Human Rights, through its case law and contacts with national courts, helps ensure that Convention standards are implemented.

The major challenge today is to ensure that European human rights law remains a single body of law based upon common values. The ECHR is confronted with an expanding number of Member States and problems, all of which have led to a crisis in caseload. The

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263. *Lawless v. Ireland*, Eur. Ct. H.R. (ser. A) Nos. 1 (Nov. 14, 1960), 2 (April 7, 1961) and 3 (July 1, 1961).

264. *Ireland v. United Kingdom*, *supra* note 180.

magnitude of the problem facing the Court can be seen in its recent statistics.<sup>265</sup> In 2001, the Court issued more than one-third of the total number of judgments delivered since it was created.<sup>266</sup> It now receives close to 800 letters every day. From 1988 to 1999, the number of provisional applications grew from 4,044 to 20,538. Then in one year, the number jumped to 26,398. In 2001, the number again jumped to 31,393. The number of cases registered after preliminary examination shows a similar increase. During 2001, 13,858 cases were registered, some 2,200 more than were registered during the entire first 30 years of the Convention. Not only do the statistics reveal a huge surge in complaints, but they show the origin of the complaints in every Member State. This means the Court must work in 40 national languages in order to ensure that the right of petition is real and not illusory. In practice, the judges often have to examine applications drafted in an unfamiliar language.

The system is seriously overloaded and with relatively limited resources. As of February 1, 2001, the Registry had 185 permanent officials, 95 temporary employees, and 15 trainees. All legal systems and languages must be represented among them. The Committee of Ministers is also increasingly burdened, which threatens effective monitoring of compliance with the Court's judgments. Between January and September 2002, the Committee of Ministers examined 715 new judgments—they were 493 during the same period in 2001—and adopted 173 Final Resolutions compared to 84 during the same period in 2001. As of September 2002, close to 3250 cases were pending before the Committee of Ministers for supervision of execution.

Given these growing problems, the reforms of Protocol No. 11 are themselves under study in a search for a “reform of the reform.”<sup>267</sup> An examination undertaken towards the end of 2001 at the request of the Committee of Ministers concluded that “immediate action is indispensable if the Court is to remain effective and retain its credibility

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265. Survey of Activities, *supra* note 237.

266. The Court delivered 888 judgments in 2001, out of the total number of 2,597 judgments delivered by the Court since 1959. *Id.* at 29.

267. *Report of the Evaluation Group to the Comm. of Ministers on Eur. Ct. H.R.*, Eur. Consult Ass., 109th Sess., Doc. No. EG Court (2001)1, available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Steering\\_Committees/CDCJ/Documents/Documents%202001%20E.asp](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/CDCJ/Documents/Documents%202001%20E.asp) (last visited Jan. 16, 2003).

and authority.”<sup>268</sup> Assuming that the substantive rights guaranteed should not be reduced nor the right of individual petition eliminated, the Evaluation Group sought means to enable the Court to dispose of applications within a reasonable time while maintaining the quality of its judgments. The recommendations focus on five areas: national measures, execution of judgments, measures not involving amendment of the Convention, resources, and measures involving amendment of the Convention.

In respect to national measures, the subsidiary nature of Convention machinery is recalled as states are encouraged to provide effective domestic remedies and systematically screen proposed legislation and administrative regulations. In addition, national courts must be strengthened and procedures must be introduced to re-open domestic proceedings after a finding by the Court of a Convention violation. Training in human rights should be reinforced, especially for those responsible for law enforcement, and the Convention and its case law should also be included in the curricula of university law faculties and professional institutions. The execution of judgments is necessary and a priority matter if the Court is to be effective. The Evaluation Group noted the large number of repetitious cases, most of which would not be necessary if state law or practice changed promptly to comply with the Court’s judgments. The Evaluation Group considered the idea of imposing financial penalties for non-execution of a judgment, but saw problems in calculating such penalties, given the lengthy legislative process that may be required to give effect to changes required by a judgment. The Group also suggested that the Court’s recent practice of identifying the measures a state should take to constitute *restitutio in integrum* (full restitution) could be further developed and “would be beneficial in the context of the execution of judgments.”<sup>269</sup> The main new element indicated is an increased role for the Parliamentary Assembly in monitoring execution of judgments. The political pressure coming from legislators could be an important element in maintaining the effectiveness of the system.

Several proposals for reform concern internal case management procedures, enhancing the role of registry lawyers, and creating summary procedures to sift through cases earlier in the process. Greater

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268. *Id.* at 9.

269. *Id.* at 39. The Court first called for restitution in *Papamichalopoulos v. Greece*, 330-B Eur. Ct. H.R. (ser. A) (1995), art. 50. See also *Brumarescu v. Romania*, Eur. Ct. H.R. (1999), available at <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Nov. 9, 2002).



recourse to friendly settlement is encouraged; the Court has already begun to impose settlements in a few cases by threatening to dismiss actions if applicants do not accept a fair settlement offer. Other proposals are controversial among judges and lawyers. Some of the judges see the Court's role as best limited to taking up "important" cases of gross or systematic violations; others feel it is important to maintain the availability of the process for all victims of rights violations. There is a similar division over the utility of fact-finding, with some judges considering that memories and evidence are too unreliable after the five to seven years it may take a case to get to the Court, while others feel that the ability of the Court to undertake fact-finding serves as an important check on efforts to conceal or distort the record in human rights cases. Judges and registry lawyers also disagree among themselves about the value of oral argument. Unfortunately, these controversies are likely to be resolved for time-management considerations rather than for other, perhaps more substantive reasons. The press of the caseload is likely to dictate the future of ECHR practice.

While additional resources are certainly needed to ensure the ECHR's functioning, it is impossible to foresee infinite growth to match the growing caseload. The Convention itself sets the maximum number of judges and the Court should not create a hidden judiciary by shifting more work from the judges to the registry staff. Even with an increase in lawyers and streamlined procedures, it is estimated that the caseload will surpass the capacity of the Court by 2005. Several alternatives are under consideration. A possible response, already mentioned, would give the Court discretionary jurisdiction, allowing it to pick its cases for substantial issues. This is the least desirable option as it takes away access to the Court at a time when it is most needed and it risks exacerbating the growing feeling that the Court affords selective justice. A second option would be to create a remand process, allowing cases to be sent back to local authorities or tribunals for action. A third option would be to create a separate division within the court to handle all preliminary matters, leaving the bulk of the Court available to deal with issues of the merits. These latter two proposals are less radical and could remedy the problem without destroying the right of access to justice.

Like the ECHR, the ECJ is also increasingly constrained by a heavy case docket. The Treaty of Amsterdam adds to this by giving additional jurisdiction over issues concerning visas, asylum, and im-

migration. More appeals are also coming from the Court of First Instance. The average length of proceedings is now close to two years. Like the European Court of Human Rights, the ECJ may adopt various reforms to alleviate the burden.

These problems can be seen as a reflection of the success of the regional courts, whose functions differ somewhat. The European Court of Human Rights acts as a safety net to ensure that minimum European standards adopted in the Convention are given effect by the Contracting Parties. It has largely succeeded. According to Buerghenthal,

the decisions of the European Court are routinely complied with by European governments. As a matter of fact, the system has been so effective in the last decade that the Court has for all practical purposes become Western Europe's constitutional court. Its case law and practice resembles that of the United States Supreme Court.<sup>270</sup>

The ECJ has emphasized the supremacy of EC Community law—not only the treaties, but the regulations and directives as well—over the law of the Member States. In so doing, it has implied and applied notions of fundamental rights, increasing its jurisdiction over the issue.

The supremacy of EC law and EC emphasis on harmonizing Member State laws and adopting common standards to achieve market integration and European citizenship produces the perhaps initially surprising result that Member States may have less discretion over human rights matters within EC jurisdiction than they do in the ECHR system with its overt human rights mandate. The EC is expressly integrationist and its demands for elimination of market distortions allow less scope for diversity of national laws and policies than does the ECHR with its doctrine of margin of appreciation and respect for national differences. Of course, application of the EC doctrine of subsidiarity will mean that many human rights matters will not fall within EC jurisdiction and national discretion will remain. In general, however, the future may see a two-tiered European human rights system, where stricter regional governance on issues such as employment discrimination between men and women will obtain among EU Member States, coupled with a broader, but at the same time looser, regional review possible through the ECHR. With membership in the Council of Europe and the EU growing, the boundaries of human rights jurisdiction in Europe thus continue to expand both

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270. T. BUERGENTHAL & D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 36 (3d ed. 1996).

geographically and legally. Horizontal and vertical tensions in governance can be expected to continue and provide further fruit for discussion on the means and methods to best guarantee respect for human rights in Europe.